REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF NEVADA

Volume 126

CHAZ HIGGS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 49883

January 14, 2010 222 P.3d 648

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Defendant was convicted by a jury in the district court of first-degree murder. Defendant appealed. The supreme court, HARDESTY, J., held that: (1) district court denial of defendant's request for a continuance was not an abuse of discretion, (2) evidence was sufficient to support conviction for first-degree murder, and (3) the district court did not abuse its discretion when it allowed witness to testify as an expert about the presence of succinylcholine in the victim's urine.

Affirmed.

CHERRY, J., dissented in part; SAITTA, J., dissented in part.

Law Office of David R. Houston and *David R. Houston*, Reno; *Richard F. Cornell*, Reno, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Richard A. Gammick*, District Attorney, and *Terrence P. McCarthy*, Deputy District Attorney, Washoe County, for Respondent.

Peter Chase Neumann, Reno, for Amicus Curiae Nevada Justice Association.

1. CRIMINAL LAW.

   District court denial of defendant's request for a continuance was not an abuse of discretion, in prosecution for murder; defendant failed to establish that he was prejudiced by the denial, given that defense counsel sought a continuance on the basis that his expert did not have adequate time to evaluate the conclusions in the FBI's toxicology report, the expert had approximately six months to question, evaluate, and determine whether additional information about the toxicology report would be necessary for his consideration, and the FBI toxicologist spoke with the defense expert and answered all questions posed by him.

2. CRIMINAL LAW.

   The supreme court reviews the district court's decision regarding a motion for continuance for an abuse of discretion.

3. CRIMINAL LAW.

   Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made.

4. CRIMINAL LAW.

   If a defendant fails to demonstrate that he was prejudiced by the denial of a continuance, then the district court's decision to deny the continuance is not an abuse of discretion.

5. HOMICIDE.

   Evidence was sufficient to support conviction for first-degree murder; the victim's treating physician testified that tests revealed that victim did not have a stroke or a heart attack, and that since succinylcholine was found in the victim's ante mortem urine sample, succinylcholine poisoning was the likely cause of death, two other physicians similarly testified that the victim's death was a result of succinylcholine poisoning, there was no evidence that succinylcholine was administered to victim in the hospital, witness testified that the day before the victim was found unconscious defendant stated to her that ''If you want to get rid of somebody, you just hit them with a little succs,'' he made a motion like he was giving someone an injection, and he explained that succinylcholine could not be detected postmortem.

6. CRIMINAL LAW.

   In reviewing the sufficiency of the evidence, the supreme court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

7. CRIMINAL LAW.

   The district court did not abuse its discretion when it allowed witness to testify as an expert about the presence of succinylcholine in the victim's urine, in prosecution for murder in which it was alleged that defendant killed the victim by administering a lethal dose of succinylcholine; witness had scientific and specialized knowledge, her testimony assisted the jury in understanding succinylcholine, and it was limited to her knowledge and expertise. NRS 50.275.

8. CRIMINAL LAW.
   District court determination that witness was qualified to testify as an expert witness was not an abuse of discretion in murder prosecution; witness had a science degree, was employed with the FBI's toxicology department, and had acquired specialized knowledge and training with regard to succinylcholine testing. NRS 50.275.
9. CRIMINAL LAW.
   District court determination that expert witness's testimony would assist the jury was not an abuse of discretion in prosecution for murder in which it was alleged that defendant killed the victim by administering a lethal dose of succinylcholine; witness was part of a small group of toxicologists in the country with experience in testing for succinylcholine, had ongoing training in the field, and had authored dozens of publications and given numerous presentations on matters relevant to her field.
10. CRIMINAL LAW.
    The district court's failure to provide defendant's proffered jury instruction on spoliation of evidence was not an abuse of discretion in prosecution for murder; there was no evidence that the State acted in bad faith in failing to preserve an injection site tissue sample from the victim's body, and defendant failed to show that he was prejudiced by the State's failure to preserve the tissue sample.
11. CONSTITUTIONAL LAW.
    Due process requires the State to preserve material evidence. U.S. CONST. amend. 14.
12. CRIMINAL LAW.
    The State's failure to preserve material evidence can lead to dismissal of the charges if the defendant can show bad faith or connivance on the part of the government or that he was prejudiced by the loss of the evidence.
13. CRIMINAL LAW.
    District courts have broad discretion to settle jury instructions.
14. CRIMINAL LAW.
    Pursuant to the plain-error review standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal, appellant Chaz Higgs challenges his conviction of first-degree murder for the death of his wife, Kathy Augustine. Higgs asserts that his conviction should be overturned for the following reasons: (1) the district court abused its discretion when it denied his motion to continue the trial, (2) sufficient evidence does not support his conviction, (3) the district court abused its

[1]THE HONORABLE KRISTINA PICKERING, Justice, did not participate in the decision of this matter.

discretion when it admitted the testimony of the State's scientific expert, (4) the district court abused its discretion when it refused to give Higgs' proffered jury instruction regarding the spoliation of tissue samples, and (5) numerous alleged instances of plain error deprived him of a fair trial.

We note from the outset that we originally decided this appeal in an unpublished order filed on May 19, 2009. Amicus curiae Nevada Justice Association subsequently moved for publication of our disposition as an opinion. Cause appearing, we grant the motion and publish this opinion in place of our prior unpublished order. In so doing, we use this opportunity to reaffirm the standard for the admissibility of expert testimony in Nevada, as it is articulated by NRS 50.275. While Nevada's statute of admissibility tracks the language of its federal counterpart, Federal Rule of Evidence (FRE) 702, we see no reason to part with our existing legal standard. In so deciding, we decline Higgs' invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Further, we reject the notion that our decision in *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), adopted the standard set forth in *Daubert* inferentially. We conclude, therefore, that Higgs' challenge to the testimony of the State's scientific expert fails, as do all the other arguments he raises on appeal. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

In 2003, Higgs, an experienced nurse, and Augustine, a Nevada politician, married. By all accounts, the marriage had deteriorated by 2006. On July 7, 2006, Kim Ramey, a critical care nurse who worked with Higgs, had a conversation with Higgs about his relationship with Augustine. Higgs stated that they were having marital problems and that he intended to seek a divorce. Later that day, Higgs and Ramey had another conversation about a widely publicized case in which a husband killed his wife, shot the judge presiding over the couple's divorce, and fled to Mexico. Higgs commented during their conversation, ''That guy did it wrong. If you want to get rid of someone, you just hit them with a little succs because they can't trace it [postmortem].'' ''Succs'' referenced succinylcholine, a paralytic drug that is commonly used in emergency rooms.

In the early morning hours of July 8, 2006, Higgs called emergency personnel to the couple's home after he found Augustine unresponsive. The paramedics were able to restore Augustine's heartbeat, but she could not breathe on her own. Augustine was transported to a local hospital.

Upon learning of Augustine's admittance, Ramey informed police about her previous conversation with Higgs. Ramey also informed a colleague who, in turn, informed Augustine's attending

physician, Dr. Richard Ganchan, and told him to test for a succinylcholine level on Augustine.

Neither the paramedics nor the hospital staff administered any succinylcholine while treating Augustine. Hospital staff, however, obtained a urine sample for treatment purposes. On July 11, 2006, Augustine died after she was removed from life support.

The urine sample, which was an ante mortem sample, meaning it was taken from Augustine while she was alive, and the tissue samples, which were postmortem, were tested by the hospital's toxicologist and subsequently the coroner's laboratory. The hospital lab results of the urine sample tested positive for barbiturates. The coroner's office laboratory results showed no signs of any substances; however, since the laboratory had been ordered to look for succinylcholine, it sent specimens to the FBI for further testing. The urine sample tested positive for both succinylcholine and succinylmonocholine,[2] but the postmortem tissue samples showed no signs of any substance.

In September 2006, Higgs was arrested in Virginia. In December 2006, Higgs was formally charged with first-degree murder in connection with the death of Augustine. The State's theory of the case was that sometime on either July 7 or 8, 2006, Higgs murdered Augustine by administering a lethal dose of succinylcholine.

Pretrial proceedings

In December 2006, the parties stipulated to a trial date of July 2007. The district court appointed Chip Walls as Higgs' expert witness. Walls is one of the foremost experts on the subject of succinylcholine. The State sent the FBI toxicology report to Walls in December 2006. A month later, in January 2007, both parties stipulated to advance the trial date to June 2007.

In May 2007, District Court Judge Jerome Polaha, upon the stipulation of the parties, entered an order instructing the State to provide Higgs more information regarding the description of methodology and procedures used in the FBI's succinylcholine testing. The same month, Higgs filed a motion to continue the trial. He argued that Walls needed more time to evaluate and verify the methodology utilized by the FBI laboratory because the FBI's test results were inconsistent. At the hearing on the motion to continue, defense counsel admitted that no one was to blame for the fact that Walls had not finished evaluating the FBI's test results. In fact, defense counsel stated that the parties had worked together to compile the list of materials set forth in Judge Polaha's discov-

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[2]''[S]uccinylcholine is a very unstable compound that breaks down rapidly to produce succinylmonocholine, a less unstable compound that breaks down to form succinic acid and choline, which are naturally present in the human body.'' *Sybers v. State*, 841 So. 2d 532, 542 (Fla. Dist. Ct. App. 2003).

ery order. The district court denied the motion to continue the trial. In making the decision, the district court noted that the defense received the FBI toxicology report in early December 2006, some 24 weeks before the trial date, and only now was raising concerns. It further stated that Walls could indeed testify that, based on his scientific knowledge and expertise, he did not trust the validity of the FBI test results, if that were the case. Finally, the district court observed that the State had the burden of proof, not the defense, and therefore Higgs did not need to find an alternative theory to disprove the State's evidence.

On June 18, 2007, the first day of trial, the district court held a hearing on Higgs' motion in limine regarding scientific evidence and expert witness testimony. During that hearing, Higgs' expert witness, Walls, testified extensively regarding the FBI's toxicology report and the methodology used by its toxicologist, Madeline Montgomery. Walls stated that Montgomery exchanged information with him and answered all of his questions during a telephone call.

The trial

At trial, Ramey testified regarding her conversation with Higgs about succinylcholine and how he described it as a drug that could not be detected postmortem. The State further presented the testimony of various hospital staff, who testified as to the availability of succinylcholine to hospital personnel. Registered nurse and Higgs' former manager, Tina Carbone, testified that succinylcholine was stored on crash carts,[3] in rapid sequence intubation kits in emergency rooms, and in secured refrigerators alongside other drugs, such as etomidate, a short acting intravenous anesthetic agent. Marlene Swanbeck, a registered nurse working at the same hospital as Higgs, testified that while a nurse needed to type in a security code to get registered drugs like succinylcholine, once accessed, the nurse could take any other drug instead of, or in addition to, what the nurse listed he or she was taking and there would be no way of tracking such misuse.

Building on Swanbeck's testimony, the State offered evidence that it had found a vial of etomidate in a backpack in the master bedroom of Augustine and Higgs' home, yet there was no record of etomidate missing from hospital records. City of Reno police officer David Jenkins testified that he found the same backpack when executing an arrest warrant for Higgs in Virginia. Jenkins further testified that the backpack included a nursing book, with a bookmark at the page concerning the administration of succinylcholine, and a laminated 3" × 5" card with information concerning succinylcholine.

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[3]Generally, crash carts contain defibrillators and intravenous medications.

Dr. Steve Mashour, one of Augustine's attending physicians, testified that because succinylcholine was found in Augustine's ante mortem urine sample, the cause of death could be attributed to succinylcholine poisoning. Dr. Mashour explained that Augustine's routine tests showed no signs of a stroke or heart attack. The State presented two other witnesses, Dr. Stanley Thompson and Dr. Paul Katz, who similarly ruled out a heart attack or stroke as a cause of death. Both doctors opined that Augustine's death was consistent with succinylcholine poisoning.

Dr. Ellen Clark, a forensic pathologist who performed the autopsy on Augustine, testified that, in her opinion, Augustine died from succinylcholine toxicity. Dr. Clark also testified that if a nurse is good at delivering an injection, there will be no resulting bruise or large bloody track underneath the skin. She testified that the succinylcholine could have been injected into Augustine in such a manner that she would not be able to identify the injection site during an autopsy. Dr. Clark further testified that the autopsy did not reveal damage to Augustine's heart that would be reflective of a massive heart attack. As to the tissue sample, taken from what appeared to be a puncture wound, Dr. Clark explained that she could not be certain as to whether the area was an injection site or simply a needle mark. In sum, she could not confirm that the tissue sample was the site where the succinylcholine was administered.

With regard to the tissue sample, Dr. Paul Sohn, a pathologist who testified for Higgs, stated that his examination of the tissue sample and the photographs of the puncture wound led him to conclude that it was a fresh wound, barely 48 hours old. Dr. Sohn testified that it was not medically possible that this wound was 80 hours old (80 hours would have meant that the skin was punctured sometime on either July 7 or July 8, 2006, when the State theorized Higgs injected Augustine with succinylcholine). Dr. Sohn testified that he could not date the actual tissue sample because when he received it from the FBI it had been frozen, unfrozen, and frozen once again. Despite not being able to test the tissue sample himself, Dr. Sohn testified that he was certain that the wound site could not have been inflicted before Augustine arrived at the hospital.

Madeline Montgomery, the FBI toxicologist, testified as to the procedure and methodology of the bureau's succinylcholine testing. Montgomery testified that she had ongoing training in the field and had authored several publications and given numerous presentations on matters relevant to her field. Montgomery explained that the FBI laboratory in which she worked had dealt with succinylcholine in the past and had procedures in place for its testing. She testified that Augustine's urine sample was in a liquid state when

she received it and that she refroze it to prevent degradation. Montgomery explained that succinylcholine is a very volatile chemical; it breaks down into succinylmonocholine in the body; the substance does not occur naturally in a living human; and she found succinylcholine and its breakdown product, succinylmonocholine, in Augustine's urine sample. She stated that she ran three separate urine tests on Augustine's urine sample and each test showed the presence of succinylcholine and succinylmonocholine. Montgomery testified that the tissue samples did not test positive for succinylcholine or succinylmonocholine. She explained that this was not surprising because the chemical is so unstable and body enzymes act upon it to break it down. Accordingly, Montgomery testified that it is unusual to find succinylcholine in tissue samples.

There was also evidence presented about the nature of Higgs and Augustine's marriage. Several witnesses confirmed that Higgs routinely referred to Augustine in derogatory terms. Paramedics who transported Augustine to the hospital testified that Higgs appeared unemotional, even reading the newspaper while in the ambulance. Other witnesses testified that Higgs appeared unemotional after his wife died. One friend testified about a particularly nasty phone call between Higgs and Augustine's mother following Augustine's death, during which Higgs strongly disparaged Augustine.

Higgs' strong dislike for his wife was further bolstered by the testimony of Linda Ramirez, a hospital employee who worked with Higgs. She testified that the two of them had a flirtatious relationship. Ramirez read one of Higgs' e-mails that he had sent to her in which he explained, ''[I]t is my quest in life to drive this bitch [Augustine] crazy. . . . I have things in motion. . . . I will be free, and I will be with you.''

The jury found Higgs guilty of first-degree murder. This appeal followed.

DISCUSSION

Motion to continue the trial

[Headnote 1]

Higgs argues that the district court violated his rights under the Fifth, Sixth, and Fourteenth Amendments when it denied his motion to continue the trial. He asserts that his defense expert did not have adequate time to evaluate the conclusions of the FBI's toxicology report that confirmed the presence of succinylcholine in Augustine's urine. Specifically, he asserts that FBI toxicologist Montgomery defied the court order instructing her to provide discovery. Without the full FBI report, Higgs argues that his expert witness, Chip Walls, could not testify as to the validity of the

FBI report and the defense could not adequately cross-examine Montgomery.

[Headnotes 2-4]

''This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion.'' *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made. *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978). This court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial. *See id*. In other instances, we have held that a denial of a motion to continue was an abuse of discretion if ''a defendant's request for a modest continuance to procure witnesses . . . was not the defendant's fault.'' *Rose*, 123 Nev. at 206, 163 P.3d at 416. However, if a defendant fails to demonstrate that he was prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion. *Id*.

We conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue the trial because Higgs has failed to demonstrate that he was prejudiced by the denial.

By defense counsel's own admission, there was no explanation for the delay in asking for more information regarding the FBI's toxicology report. Higgs' expert witness, Chip Walls, had approximately six months to question, evaluate, and determine whether additional information about the toxicology report would be necessary for his consideration. During the hearing on the motion to continue, the State explained that Walls had received the toxicology report on December 7, 2006, yet Higgs failed to ask for additional information about the report until May 2007. In regard to the delay, defense counsel stated, ''The fault, unfortunately, really doesn't lie anywhere.'' Defense counsel, Walls, the State, and Montgomery *all worked together* to compile the list of materials, which constituted part of the discovery order signed by Judge Polaha. In addition, Montgomery spoke to Walls on the phone. Walls later testified that during that phone conversation, the two exchanged information and Montgomery answered his questions. Walls admitted that he could have asked Montgomery more specific questions and she would have answered them, but he chose not to ask additional questions. Walls confirmed that he and Montgomery exchanged information and all that was left was for him ''to complete [his] thoughts with her.'' The additional information that Montgomery compiled for Walls had to be cleared by the

FBI's attorneys before it could be sent to Walls. Accordingly, we conclude that there is no evidence in the record supporting Higgs' contention that Montgomery violated the district court's discovery order. Rather, substantial evidence on the record shows that Montgomery was cooperative with the defense.

We further observe that on the morning of June 18, 2007, before the beginning of the trial, Walls testified extensively during a motion-in-limine hearing regarding expert witness testimony. He testified about succinylcholine in general and the difficulties of testing the substance, as well as the problems with testing urine samples for succinylcholine. Walls' testimony was thoughtful and thorough; he explained the aspects of the FBI testing he agreed with and the aspects he questioned. Perhaps most importantly, Walls testified that while he had some reservations regarding the FBI's methodology, he agreed with the findings of Montgomery's toxicology report.

Higgs does not offer any reason why Walls did not testify at trial as he did at the hearing on the motion in limine. However, Walls' testimony during the motion-in-limine hearing supplied to Higgs the discovery necessary to conduct an effective cross-examination of Montgomery. *See Pantano v. State*, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006) (observing that '' 'the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish' '' (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986))). Moreover, by defense counsel's own statements at the continuance hearing, Walls had known for weeks that the FBI lab machine that Montgomery had used had malfunctioned at one point. The evidence on the record shows that the discovery available to Higgs at the time of trial met constitutional guarantees of an opportunity to effectively cross-examine Montgomery, and therefore, we conclude that Higgs was not prejudiced by the district court's denial of the motion to continue.

We also note that Higgs had a number of other opportunities before trial to seek a continuance because he needed more time to evaluate the toxicology report. The district court held several pretrial hearings on other motions during which Higgs could have again asked for more time. Specifically, the district court held a hearing on June 8, 2007, to confirm the trial date, during which Higgs' defense counsel expressly stated, ''We'll be ready on June 18th.''

We make a final observation with regard to the motion to continue. It was based on the defense's need for more time to investigate evidence relating to the cause of death. This court has held that cause of death can be shown by circumstantial evidence. *West v. State*, 119 Nev. 410, 416, 75 P.3d 808, 812 (2003). A denial of

a motion to continue to allow the defense to investigate a report as to the cause of death is not prejudicial when the State could prove cause of death with other circumstantial evidence. Even if Higgs had more time to investigate the FBI toxicology report, it would not change the fact that the State had enough circumstantial evidence to prove Augustine's cause of death.

We therefore conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue the trial because Higgs fails to demonstrate that any prejudice resulted from the denial.

Sufficiency of the evidence

[Headnote 5]

Higgs argues that the evidence presented at trial does not support a conviction of first-degree murder. We disagree.

[Headnote 6]

In reviewing the sufficiency of the evidence, we must decide '' 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' '' *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (quoting *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998)). We conclude that there was sufficient evidence to support Higgs' conviction.

The State presented testimony establishing that Augustine's death was not the result of natural causes but, rather, was the result of succinylcholine poisoning. Attending physician Dr. Mashour testified that routine tests at the hospital showed no signs of a stroke or heart attack. He testified that because succinylcholine was found in Augustine's ante mortem urine sample, succinylcholine poisoning was the likely cause of death. Two other physicians, Dr. Thompson and Dr. Katz, similarly testified that Augustine's death was a result of succinylcholine poisoning. In addition, Dr. Clark, the forensic pathologist who performed the autopsy on Augustine, also testified that in her opinion the cause of death was succinylcholine toxicity. She further testified that the drug could have been injected in such a manner as to go undetected. Dr. Clark testified that the autopsy revealed that Augustine's heart showed no signs of disease that would cause a massive heart attack. FBI toxicologist Montgomery explained that she found succinylcholine and its breakdown product, succinylmonocholine, in Augustine's urine sample. Montgomery testified that all three tests she ran on the urine sample tested positive for the presence of succinylcholine and succinylmonocholine. She further stated that it is not unusual that the drug was not present in Augustine's tissue sample because

it is such a volatile chemical that the body acts quickly to break it down. The State also presented evidence that Augustine was not administered any succinylcholine at the hospital.

The State also presented evidence establishing that Higgs killed Augustine. Ramey testified that the day before Augustine was found unconscious, she had a conversation with Higgs during which he commented on a local murder trial saying, ''That guy did it wrong. If you want to get rid of somebody, you just hit them with a little succs.'' Ramey testified that Higgs then made a gesture mimicking giving a person an injection. She further testified that Higgs explained to her that succinylcholine could not be detected postmortem. In addition to Ramey's testimony, the State presented circumstantial evidence of Higgs' access to succinylcholine. The substance is just one of the resources available to hospital staff like Higgs, who is an experienced nurse. Testimony established that succinylcholine is generally stored on crash carts, in emergency rooms, and in secured refrigerators, and while one needs a security code to access the refrigerated drugs, once accessed, additional drugs can be taken from the secured refrigerator without notice.

To build its theory that, as an experienced nurse, Higgs could easily obtain succinylcholine as well as other drugs, the State offered the testimony of Officer Jenkins. Officer Jenkins testified that when he executed the search warrant at the Higgs/Augustine home, he found the drug etomidate in a backpack in the master bedroom. Officer Jenkins stated that he collected the vial of etomidate, but did not take the backpack. Officer Jenkins testified that later, when executing the arrest warrant in Hampton, Virginia, the same backpack was in Higgs' possession and he collected it. He explained that this time the backpack contained a nursing book with a bookmark at the page concerning the administration of succinylcholine and a laminated 3"$\times$ 5" card with information concerning succinylcholine. Additionally, the State presented evidence that there was no hospital record of a missing vial of etomidate—even though a vial had indeed been found in the backpack in Higgs' home—establishing that drugs can be taken out of secured locations without notice.

The State also presented evidence of the deteriorated relationship between Higgs and Augustine. Witnesses testified that Higgs regularly used derogatory terms when referring to Augustine, he strongly disparaged his wife to Augustine's mother just days after Augustine's death, and he appeared unemotional throughout the ordeal. Additionally, Ramirez testified as to the flirtatious relationship that she had with Higgs and read from one of his e-mails in which Higgs stated that he wanted to drive Augustine crazy, he had plans in motion, and he would soon be free to be with Ramirez.

We conclude that, in addition to the medical evidence and the FBI toxicology report, there was other significant evidence pre-

sented to the jury—namely, Higgs' deteriorating relationship with his wife, his access to the succinylcholine, and his own comments to Ramey—that was sufficient for any rational trier of fact to find the essential elements of first-degree murder beyond a reasonable doubt.

Expert testimony

[Headnote 7]

Higgs next contends that the district court abused its discretion when it allowed Montgomery to testify about the presence of succinylcholine in Augustine's urine. In so doing, he does not contend that the district court was incorrect in admitting the testimony under Nevada law. Rather, Higgs invites this court to adopt the standard of admissibility for expert testimony established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), under which he asserts that Montgomery's testimony was inadmissible. Because the admissibility of expert witness testimony post-*Daubert* has resulted in considerable confusion and controversy, we determine it is necessary to revisit the opinion, its history, and its trajectory.

Before *Daubert*, the seminal case for expert witness testimony was *Frye*. In *Frye*, the Court of Appeals of the District of Columbia (now known as the United States Court of Appeals for the District of Columbia Circuit) held that an expert opinion based on a scientific technique is inadmissible unless the technique has ''gained general acceptance in the particular field in which it belongs.'' 293 F. at 1014.

In *Daubert*, the United States Supreme Court concluded that *Frye*'s ''austere standard'' was ''incompatible'' with the Federal Rules of Evidence. 509 U.S. at 589. In concluding that the general acceptance test of *Frye* had been ''displaced'' by the Federal Rules of Evidence, *id.*, the Supreme Court interpreted the Federal Rules as a means of liberalizing the admission of expert witness testimony, stating that:

> . . . a rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony.

Id. at 588 (internal quotation marks omitted).

After rejecting *Frye* and recognizing the more relaxed standard of the Federal Rules, the High Court explained that any analysis pursuant to FRE 702 must focus on two overarching issues: the expert testimony's relevance and reliability. *Id.* at 589. The majority then stated that it was appropriate for it to make ''some general ob-

servations'' about the inquiry into relevance and reliability of expert witness testimony. *Id.* at 593. Before discussing factors that it determined may bear on the issues of relevance and reliability, the majority emphasized that the factors discussed were neither exhaustive nor applicable in every case.[4] *Id.* Indeed, the Supreme Court expressly stated that ''[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test,'' *id.*, and called the inquiry into admissibility a ''flexible one.'' *Id.* at 594. It characterized the trial judge's role to determine whether the proferred testimony met the criterion of admissibility as that of a gatekeeper. *Id.* at 597. Thus, while the Supreme Court interpreted FRE 702 as the gate leading toward admissibility, it placed numerous factors, albeit ''flexible'' ones, upon the opening of the gate and cast the trial judge in the role of gatekeeper.

In his dissent, Chief Justice Rehnquist was critical of the majority's decision to provide lower court's with such elaborate factors:

> Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of technical or other specialized knowledge—the other types of expert knowledge to which Rule 702 applies—or are the general observations limited only to scientific knowledge?

Id. at 600 (Rehnquist, C.J., dissenting) (internal quotation marks omitted). Chief Justice Rehnquist was concerned that the factors would be applied strictly notwithstanding the majority's statements against such application, would cause confusion, and would force judges to become ''amateur scientists.'' *Id.* at 601.

After *Daubert*, the Supreme Court had the opportunity to consider the issue of expert witness testimony again in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and later in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). First, in *General Electric Co. v. Joiner*, the Supreme Court held that the proper appellate review of a trial court's decision to admit or exclude expert witness testimony was for an abuse of discretion. 522 U.S. at 143. In so holding, the Supreme Court noted that the appellate court ''failed to give the trial court the deference that is the hallmark of

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[4]In sum, the *Daubert* opinion determined that, functioning as a gatekeeper with respect to the admission of expert testimony, the judge may wish to consider whether the evidence at issue (1) has been tested, (2) ''has been subjected to peer review and publication,'' (3) has a known or potential error rate, and (4) has general or widespread acceptance. *Daubert*, 509 U.S. at 593-94.

abuse-of-discretion review.'' *Id*. In sum, *Joiner* highlighted the trial judge's discretion in determining expert witness testimony post-*Daubert*.

Following *Joiner*, the U.S. Supreme Court extended its holding in *Daubert* to include all expert testimony, rather than just scientific. *Kumho Tire Co. v. Carmichael*, 526 U.S. at 141. While it expanded *Daubert* to include more expert testimony, the Court was careful to note that in so doing, it was vesting *more* discretion in the trial judge and *not* mandating strict adherence to *Daubert*'s admissibility factors:

> The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.
>
> *Daubert* itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

Id. at 150-51.

Thus, in *Kumho*, the U.S. Supreme Court made clear its mandate in *Daubert*: allow district court judge's discretion to carry out their gatekeeping duties and treat the *Daubert* factors as flexible. Notwithstanding the mandate for a flexible standard, lower courts have applied *Daubert* in a rigid manner. *See, e.g.*, *U.S. v. McCaleb*, 552 F.3d 1053, 1060-61 (9th Cir. 2009) (explaining that the *Daubert* factors are flexible, but using only the *Daubert* factors in evaluating whether the district court abused its discretion when allowing testimony of a forensic chemist); *see also U.S. v. Baines*, 573 F.3d 979, 985-87 (10th Cir. 2009) (explaining that the *Daubert* factors are flexible, but then engaging in a strict application of the *Daubert* factors in its review of trial court's decision on expert witness testimony); *Carrier v. City of Amite*, 6 So. 3d 893, 898 (1st Cir. 2009) (holding that lower court committed legal error because it did not conduct an evaluation of the *Daubert* fac-

tors); *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008) (explaining that the *Daubert* factors are flexible, but then using the *Daubert* factors to define threshold question of reliability); *Ruffin v. Shaw Industries, Inc.*, 149 F.3d 294, 297-300 (4th Cir. 1998) (determining that proffered expert opinion testimony was not admissible because it did not meet all the *Daubert* factors). States that have adopted the *Daubert* standard for admissibility appear to engage in similar application, remarking on the standard's flexibility, yet applying it restrictively. *See, e.g.*, *Independent Fire Ins. Co. v. Sunbeam Corp.*, 755 So. 2d 226, 234 (La. 2000) (in adopting the *Daubert* standard, court noted that it was also adopting the factors set forth in *Daubert*).

It is this type of application of the *Daubert* factors that Chief Justice Rehnquist cautioned against and that leads us to decline to adopt the so-called *Daubert* standard. Our rejection of *Daubert* is based on the resulting application of the doctrine and underscores Chief Justice Rehnquist's concerns regarding the dicta in the majority's decision. It is not what the majority stated in *Daubert* that we take issue with, but rather the subsequent rigid application of the enumerated factors.

Indeed, to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). But, to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it. We see no reason to limit the factors that trial judges in Nevada may consider when determining expert witness testimony admissibility. As evidenced by the amicus brief filed by the Nevada Justice Association, *Hallmark* appears to have been interpreted as an inferential adoption of *Daubert*. While in our view *Hallmark* demonstrates an adherence to Nevada's standard for admissibility of expert testimony, we concede that the language in that decision may be misleading. Specifically, the decision states that this court has construed NRS 50.275 to track FRE 702, and then explains that *Daubert* is persuasive authority. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. It is reasonable to construe this portion as an endorsement, if not adoption, of *Daubert*. For that, we are critical of the decision. *Hallmark* was not intended to cause confusion and cast doubt on the standard of expert witness testimony in Nevada. To the contrary, the opinion was meant to clarify the rule that in Nevada NRS 50.275 is the blueprint for the admissibility of expert witness testimony.

In *Hallmark*, we stated that *Daubert* and federal court decisions discussing it ''may provide persuasive authority.'' *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. We did not, however, and do not today, adopt the *Daubert* standard as a limitation on the factors that

a trial judge in Nevada may consider. We expressly reject the notion that our decision in *Hallmark* inferentially adopted *Daubert* or signaled an intent by this court to do so.

A close reading of *Hallmark* is helpful. This court concluded that the district court abused its discretion in allowing the expert testimony of a biochemical engineer. 124 Nev. at 502, 189 P.3d at 652. In so doing, we summarized Nevada's jurisprudence regarding expert witness testimony pursuant to NRS 50.275. 124 Nev. at 498-502, 189 P.3d at 650-52. We identified the three overarching requirements for admissibility of expert witness testimony pursuant to NRS 50.275 as (1) qualification, (2) assistance, and (3) limited scope requirements. 124 Nev. at 498, 189 P.3d at 650. This court then identified factors to be considered under each requirement. 124 Nev. at 499-502, 189 P.3d at 650-52. We were careful to note that the list of factors was not exhaustive, and we recognized that every factor may not be applicable in every case and would likely be accorded varying weight from case to case. *Id*. at 499-502, 189 P.3d at 651-52. It is worth noting that we supported our conclusion by citing to Nevada cases, not federal.

We see nothing unclear about our decision to adhere to state law, while looking at federal jurisprudence for guidance—when *needed*. Sister states, including Indiana, Tennessee, New Hampshire, and California have employed the same reasoning: rejecting an adoption of *Daubert*, applying state law admissibility standards, and looking at federal authority for guidance. *See Ingram v. State*, 699 N.E.2d 261, 262 (Ind. 1998) (explaining that in determining reliability, while many factors have been identified, there is no particular standard); *see also McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997) (''Although we do not expressly adopt *Daubert*, the non-exclusive list of factors . . . are useful . . . .''); *State v. Hungerford*, 697 A.2d 916, 922 (N.H. 1997) (declining to adopt *Daubert*, but noting that state evidence code, caselaw from other jurisdictions, as well as *Daubert*, were helpful considerations in determining the admissibility of expert witness testimony); *People v. Leahy*, 882 P.2d 321, 327 (Cal. 1994) (declining to adopt *Daubert*, yet explaining that inquiry into general acceptance entails analysis of the relevancy of the proffered testimony (relevancy being a staple of the *Daubert* inquiry)). What *Hallmark* and similar cases from sister jurisdictions demonstrate is that whether dealing with scientific or nonscientific expert testimony, there is the inevitable overlap of factors gatekeepers will consider, mainly relevancy and reliability. By not adopting the *Daubert* standard as a limitation on judges' considerations with respect to the admission of expert testimony, we give Nevada trial judges wide discretion, within the parameters of NRS 50.275, to fulfill their gatekeeping duties. We determine that the framework

provided by NRS 50.275 sets a degree of regulation upon admitting expert witness testimony, without usurping the trial judge's gatekeeping function.

Consider the differences between NRS 50.275 and FRE 702. NRS 50.275 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

FRE 702 contains similar language, but with additional conditions, which were added in response to the *Daubert* trilogy (*Daubert*, *Joiner*, and *Kumho*):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Whereas the federal rule mandates three additional conditions that trial judges should consider in evaluating expert witness testimony, the Nevada statute mandates no such requirements. Rather, NRS 50.275 provides general guidance and allows the trial judge discretion in deciding what factors are to be considered on a case-by-case basis. In *Hallmark*, we outlined some factors that are useful in this inquiry, but repeatedly noted that the factors enumerated ''may not be equally applicable in every case.'' 124 Nev. at 499, 502, 189 P.3d at 651, 652. We determine that the benefit of our approach is twofold: first, it gives judges wide discretion to perform their gatekeeping duties; and, second, it creates an inquiry that is based more in legal, rather than scientific, principles.

In Nevada, the qualification, assistance, and limited scope requirements are based on legal principles. The requirements ensure reliability and relevance, while not imposing upon a judge a mandate to determine scientific falsifiability and error rate for each case.[5] In sum, *Daubert*, as any other case decided by the U.S.

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[5]A widely cited study involving 400 state court trial judges gives credence to these concerns. In response to questions regarding the *Daubert* factors, the judges' responses showed a lack of understanding:

> . . . only 4% could provide an explanation that demonstrated a clear understanding of the testing and falsifiability factor; while a startling 35% of the judges gave answers which were unequivocally wrong. Similarly,

Supreme Court, is looked upon favorably by this court. We do not, however, adopt the *Daubert* standard as a limitation on the factors considered for admissibility of expert witness testimony. We hold that NRS 50.275 provides the standard for admissibility of expert witness testimony in Nevada.

[Headnote 8]

With those principles in mind, we now turn to whether the district court abused its discretion in allowing Montgomery to testify as an expert witness. We first consider whether Montgomery was qualified to testify as an expert witness. Among the factors the court may have considered in determining Montgomery's qualifications were whether she had formal schooling, proper licensure, employment experience, and practical experience and specialized training. *See Hallmark*, 124 Nev. at 499, 189 P.3d at 650-51.

Montgomery had a science degree, was employed with the FBI's toxicology department, and had acquired specialized knowledge and training with regard to succinylcholine testing. Accordingly, we conclude that the district court acted within its discretion when it found that Montgomery met the qualification requirement.

[Headnote 9]

Next, we consider whether Montgomery's testimony assisted the jury to understand the evidence or to determine a fact in issue. We have explained that expert witness testimony ''will assist the trier of fact only when it is relevant and the product of reliable methodology.'' *Id.* at 500, 189 P.3d at 651 (citations omitted). While each case turns upon varying factors, as discussed above, in *Hallmark*, we articulated five factors to judge reliability of a methodology, instructing the district court to consider whether the proffered opinion is

> (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

Id. at 500-01, 189 P.3d at 651-52 (citations omitted).

We conclude that the district court did not abuse its discretion when it found that Montgomery's testimony would assist the jury.

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only 4% demonstrated a clear understanding of ''error rate,'' 86% gave answers best classified as equivocal, and 10% gave clearly wrong answers. Concerning peer review, the majority of the judges clearly understood the concept, while 10% clearly did not.

Michel F. Baumeister and Dorothea M. Capone, *Admissibility Standards As Politics—The Imperial Gate Closers Arrive!!!*, 33 Seton Hall L. Rev. 1025, 1040-41 (2003) (citing Sophia Gatowski et al., *Asking the Gatekeepers: Results of a National Survey of Judges on Judging Expert Evidence in a Post*-Daubert *World*, 25 Law & Hum. Behav. 433 (2001)).

Montgomery is part of a small group of toxicologists in the country with experience in testing for succinylcholine. In addition, she had ongoing training in the field, and had authored dozens of publications and given numerous presentations on matters relevant to her field. Montgomery's work was testable although it is unclear whether it had been tested. The record does not contain evidence as to whether Montgomery's work had been subject to peer review. And, while it is unclear the scope of acceptance that Montgomery's methodology has in the scientific community, Walls testified in the pretrial hearings that he did not take issue with her methodology or results. While the testing methodology used by Montgomery did not meet all the *Hallmark* factors for assessing reliability, those factors may be afforded varying weights and may not apply equally in every case. It is up to the district court judge to make the determination regarding the varying factors as he or she is the gatekeeper—not this court. In this case, we determine that the district court acted within its discretion when it found that Montgomery's testimony would assist the jury in understanding the evidence and determining a fact in issue.

Lastly, we consider whether the district court correctly determined that Montgomery's testimony met the limited scope requirement. We conclude that it did because Montgomery's testimony consisted almost entirely of the highly particularized facts of testing Augustine's tissue and urine samples for succinylcholine. She explained the testing procedures for succinylcholine and the drug's volatile nature. Accordingly, Montgomery's testimony was limited to matters within the scope of her knowledge. In sum, as Montgomery had scientific and specialized knowledge, her testimony assisted the jury in understanding succinylcholine, and it was limited to her knowledge and expertise, we conclude that the district court did not abuse its discretion when it allowed Montgomery to testify.

Jury instructions regarding spoliation of evidence

[Headnote 10]

Higgs contends that the district court abused its discretion when it refused to give Higgs' proffered spoliation instruction regarding the State's alleged failure to properly preserve evidence of an injection site tissue sample from Augustine's body. Higgs urges this court to apply the spoliation rule set forth in *Bass-Davis v. Davis*, 122 Nev. 442, 452-53, 134 P.3d 103, 109-10 (2006), to criminal cases. In *Bass-Davis*, a civil case, this court determined that even when missing evidence is not willfully destroyed, but rather is negligently destroyed, the party prejudiced by the loss of evidence is entitled to an ''adverse inference instruction.'' *Id.*

We reject Higgs' suggestion that we extend the spoliation rule set forth in *Bass-Davis* to criminal cases. This court has articulated the rule for failure to preserve evidence in criminal cases, and we see no reason to depart from that standard.

[Headnotes 11-13]

''Due process requires the State to preserve material evidence.'' *Steese v. State*, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). The State's failure to preserve material evidence can lead to dismissal of the charges ''if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.' '' *Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (quoting *Howard v. State*, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)). Moreover, district courts have ''broad discretion to settle jury instructions.'' *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). Our review is, therefore, limited to inquiring whether there was an abuse of discretion or judicial error. *Id*.

In the present case, Higgs proffered three different adverse-inference jury instructions regarding spoliation of evidence. He asserted that the jury instructions were necessary because the State inadequately inspected and preserved the tissue sample from an injection site on Augustine's body. We disagree.

The district court properly rejected Higgs' proffered jury instructions because there was no evidence that the State acted in bad faith, and Higgs failed to show he was prejudiced by the State's failure to preserve the tissue sample. First, Higgs does not argue that the State acted in bad faith, but that it was negligent in its preservation of the tissue sample. With no issue raised as to bad faith, nor any evidence supporting such a determination, we need only consider if Higgs was prejudiced by the spoliation.

We determine that Higgs was not prejudiced by the spoliation of the tissue sample because the State did not benefit from its failure to preserve the evidence. *See Sanborn v. State*, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991) (in holding that defendant was prejudiced by State's failure to preserve the evidence, the court explained that the State's case was ''buttressed by the absence of [the] evidence''). The State's forensic toxicologist, Dr. Clark, admitted that she could not confirm that the tissue sample was from the site at which the succinylcholine was administered. More importantly, the defense's forensic toxicologist, Dr. Sohn, testified that while he could not retest the tissue sample to date it, he did examine it microscopically. He stated that his microscopic examination, along with the autopsy pictures of the site led him to conclude—with medical certainty—that the wound could not have been inflicted before Augustine was admitted to the hospital. The

failure to preserve the tissue sample prevented Dr. Sohn from dating the tissue sample, not from forming a medical conclusion in support of Higgs' defense that he did not inject his wife with succinylcholine. Accordingly, Higgs was not prejudiced by the State's failure to preserve the tissue sample from the injection site.

Accumulation of plain error

Higgs argues that a ''prodigious'' amount of plain error occurred during trial. Higgs asserts 11 instances of alleged plain error, although he does not fully brief the instances in detail and admits that counsel did not object to any of the 11 alleged instances of plain error. The 11 claims of error are as follows: (1) during Ramey's testimony, she described Higgs as a ''player'' and testified that she thought he was a ''liar''; (2) Ramey testified that when she learned that Augustine had died, she thought Higgs had killed Augustine; (3) during Higgs' testimony, the trial was delayed due to his second suicide attempt; on cross-examination, the State asked Higgs whether some people might think that his during-trial suicide attempt was a ploy for sympathy and demonstrated consciousness of guilt; (4) during the same cross-examination, the State asked Higgs what motive Ramey would have to make up her testimony; (5) during the same cross-examination, the State asked Higgs if he disagreed with Dr. Clark's testimony, and Higgs said he did; (6) State witness Michelle Ene, Augustine's executive assistant, testified that Higgs told her that he and Augustine had worked out their differences the night before Augustine was found dead; Ene testified that she ''didn't believe that for one minute'' and was suspicious that Higgs may have had something to do with Augustine's death and that he ''might have murdered her''; (7) Nancy Vinnek, one of Augustine's best friends, testified in the rebuttal case that Augustine frequently described Higgs as a ''Doctor Jeckyll and a Mr. Hyde'';[6] (8) during closing arguments, the State noted that Ramey was a good witness; (9) during closing arguments, the State noted that Higgs could not explain why Ramey would testify as she did, and that Dr. Richard Sehar, a State witness, who ordered the test to check for succinylcholine levels in Augustine's body, had testified that he believed Ramey's testimony; (10) the State argued that Higgs admitted that his toxicologist, Walls, did not disagree with the FBI's conclusion that succinylcholine was in Augustine's urine; and (11) during closing argument, the State said, ''I know the defendant doesn't

[6]We note that Higgs misstates Ramey's testimony. Ramey testified, ''And I [Ramey] would frequently describe [Higgs] to [Augustine] as a Dr. Jekyll and a Mr. Hyde.'' Therefore, it was Ramey who described Higgs as a Dr. Jekyll and Mr. Hyde, not Augustine.

have the burden . . . but he doesn't have a leash on him that prevents him from doing any of these things either.''

[Headnote 14]

''When an error has not been preserved,'' as is the case here because Higgs failed to object to any of the instances of alleged error, ''this court employs plain-error review.'' *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Pursuant to our plain-error review standard, ''an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.' '' *Id*. (quoting *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

We have reviewed each of Higgs' claims of error and conclude that Higgs has failed to demonstrate how any of the alleged errors affected his substantial rights by causing actual prejudice or a miscarriage of justice. We conclude Higgs' plain-error argument is without merit.

Accordingly, we affirm the judgment of conviction.

PARRAGUIRRE, C.J., and DOUGLAS and GIBBONS, JJ., concur.

CHERRY, J., concurring in part and dissenting in part:

I concur with the majority's rejection of the invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but I would reverse the judgment of conviction, because I conclude that the denial of Higgs' motion to continue the trial resulted in violation of his due process rights.

Higgs' motion to continue the trial was based upon the fact that his expert, Chip Walls, did not have adequate time to evaluate the conclusion of the FBI toxicology report. The conclusion of the report, that succinylcholine was found in Augustine's urine, formed the basis of the State's theory of the case.

If ever a continuance of the trial date should have been granted, the instant case cries out for that type of relief. Can it be said that there was any earth-shattering reason to proceed to a trial on a murder charge when discovery was incomplete and the FBI toxicology report lacked being a finished product?

At the time of the initial arraignment, December 22, 2006, appellant waived the statutory time to be brought to trial. Accordingly, the judge set the trial for July 16, 2007. Subsequently, the trial was moved up to June 18, 2007, per stipulation and order.

When a problem with discovery developed, appellant filed a motion to continue the trial date, which the State opposed.

A hearing on the motion to continue trial was held on May 25, 2007. Even though the defense presented information that defense

expert Walls had insufficient information to evaluate Ms. Montgomery's data and results properly, and insufficient information to give expert testimony at the trial on behalf of appellant, the court denied the continuance, ruling that the defense expert was free to testify that he did not trust the validity of the materials received from the FBI.

An excellent statement of the due process analysis is contained in *Ungar v. Sarafite*:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

376 U.S. 575, 589 (1964) (citations omitted).

In this case, there simply is nothing concrete in the record indicating why this case, having been set for trial six months after the arraignment, could not have been set out further.

This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). While each case turns on its own circumstances, this court has long recognized the cornerstone principle of due process, that ''[a]ccuseds have the right to be informed of the nature and cause of the accusation against them and must be afforded a reasonable opportunity to obtain witnesses in their favor.'' *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citing *Cole v. Arkansas*, 333 U.S. 196 (1948)).

In determining whether denial of the defendant's request for continuance violates due process, ''the focus must be on the need for the continuance and the prejudice resulting from its denial.'' *Manlove v. Tansy*, 981 F.2d 473, 476 (10th Cir. 1992) (affirming grant of habeas relief—denial of continuance denied potentially crucial evidence to defendant). So, for example, there would be no denial of due process if discrediting Ms. Montgomery hypothetically would have made no difference to the outcome of this case. *See Padgett v. O'Sullivan*, 65 F.3d 72, 75 (7th Cir. 1995). Similarly, if Mr. Walls hypothetically were merely a cumulative witness, Higgs would not be able to establish a due process violation. *See Foots v. State of LA.*, 793 F.2d 610, 611 (5th Cir. 1986).

However, if the failure to grant a continuance impinges on the defendant's rights to compulsory process and the defendant loses critical impeaching or supporting witnesses as a result, his due process rights are violated. *See State v. Timblin*, 834 P.2d 927, 929 (Mont. 1992) (citing *Singleton v. Lefkowitz*, 583 F.2d 618, 625 (2d Cir. 1978) (conviction reversed)); *March v. State*, 734 P.2d 231, 234 (N.M. 1987) (conviction reversed).

The majority concludes that Higgs failed to demonstrate that he was prejudiced by the denial. I disagree. I conclude that Higgs was prejudiced because his expert, Walls, one of the country's few experts on succinylcholine, did not testify at trial. While it is true that the defense had the toxicology report in its possession for 24 weeks, Walls did not believe the State had sent a complete report. Walls stated that the packet was incomplete and did not include backup data or documentation. The full report was the crux of the State's case against Higgs. Therefore, pursuant to *Zessman*, Higgs had the right to be informed of the nature of the accusation against him, including the complete FBI toxicology report. The lack of information not only affected Higgs' ability to obtain witnesses in his favor, it affected his ability to cross-examine the State's expert witness, Madeline Montgomery.

Why should a defense attorney be forced into a position of cross-examining an expert witness when the expert report is incomplete? If the district court's decision to deny the appellant's motion to continue the trial date is upheld by this court, it would allow incomplete discovery to be used to the detriment of a criminal defendant and appear to be a blatant denial of due process of law. Just because defense counsel cross-examined the State's expert witness during the motion in limine does not indicate that defense counsel had sufficient information in the long run to place his defense expert on the stand at trial in light of an incomplete toxicology report. *See Zessman*, 94 Nev. at 32, 573 P.2d at 1177 (citing *O'Brien v. State*, 88 Nev. 488, 500 P.2d 693 (1972)).

This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation. *See Stamps v. State*, 107 Nev. 372, 376, 812 P.2d 351, 354 (1991). Here, I conclude that in order for Higgs' counsel to have prepared an effective cross-examination of Montgomery regarding the succinylcholine found in Augustine's urine, Higgs should have been afforded more time. The continuance would have allowed Walls time to evaluate Montgomery's technique and conclusions, and to draw his own inferences. While Walls had the packet from the FBI toxicology lab for months before the trial, I note that it was not until the district court issued an order directing the State to provide Higgs with the FBI toxicology report that the State sent the report to the defense. Moreover, Walls stated that the packet the FBI sent was incomplete

and that significant data was missing. Walls felt the FBI packet was missing important information about the verification process, such as backup data. This was vital information for Walls because during the testing of Augustine's urine for succinylcholine, one of the FBI's testing machines had malfunctioned. Given the volatile nature of succinylcholine and the fact that there were questions regarding the preservation of the urine and tissue sample, I conclude that due process required that Higgs be given more time to prepare what was arguably the most important piece of evidence. I am not persuaded by the majority's argument that Higgs could have effectively presented his arguments regarding the FBI toxicology report by merely cross-examining Montgomery. An effective cross-examination itself requires time and preparation. Likewise, because of the incomplete information provided to Walls by the State, Walls did not, and would not, testify for the defense at trial. The lack of expert testimony on behalf of Higgs was nothing less than devastating to the defense effort.

For the reasons set forth above, I dissent and would reverse the judgment based on the fact that the district court abused its discretion when it denied Higgs' motion to continue.

SAITTA, J., concurring in part and dissenting in part:

I concur in the majority's rejection of the invitation to adopt the standard of admissibility set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but I would reverse the judgment of conviction, because I conclude that the denial of Higgs' motion to continue the trial resulted in a violation of his due process rights.

Higgs' motion to continue the trial was based upon the fact that his expert, Chip Walls, did not have adequate time to evaluate the conclusion of the FBI toxicology report. The conclusion of the report, that succinylcholine was found in Augustine's urine, formed the basis of the State's theory of the case.

This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion. *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). While each case turns on its own circumstances, this court has long recognized the cornerstone principle of due process, that ''[a]ccuseds have the right to be informed of the nature and cause of the accusation against them and must be afforded a reasonable opportunity to obtain witnesses in their favor.'' *Zessman v. State*, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citing *Cole v. Arkansas*, 333 U.S. 196 (1948)).

The majority concludes that Higgs failed to demonstrate that he was prejudiced by the denial. I disagree. I conclude that Higgs was prejudiced because his expert, Walls, one of the country's few experts on succinylcholine, did not testify at trial. While it is true that the defense had the toxicology report in its possession for 24

weeks, Walls did not believe the State had sent a complete report. Walls stated that the packet was incomplete and did not include backup data or documentation. The full report was the crux of the State's case against Higgs. Therefore, pursuant to *Zessman*, Higgs had the right to be informed of the nature of the accusation against him, including the complete FBI toxicology report. The lack of information not only affected Higgs' ability to obtain witnesses in his favor, it affected his ability to cross-examine the State's expert witness, Madeline Montgomery.

This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation. *See Stamps v. State*, 107 Nev. 372, 376, 812 P.2d 351, 354 (1991). Here, I conclude that in order for Higgs' counsel to have prepared an effective cross-examination of Montgomery regarding the succinylcholine found in Augustine's urine, Higgs should have been afforded more time. The continuance would have allowed Walls time to evaluate Montgomery's technique and conclusions, and to draw his own inferences. While Walls had the packet from the FBI toxicology lab for months before the trial, I note that it was not until the district court issued an order directing the State to provide Higgs with the FBI toxicology report that the State sent the report to the defense. Moreover, Walls stated that the packet the FBI sent was incomplete and that significant data was missing. Walls felt the FBI packet was missing important information about the verification process, such as backup data. This was vital information for Walls because during the testing of Augustine's urine for succinylcholine, one of the FBI's testing machines had malfunctioned. Given the volatile nature of succinylcholine and the fact that there were questions regarding the preservation of the urine and tissue samples, I find that due process required that Higgs be given more time to prepare what was arguably the most important piece of evidence. I am not persuaded by the majority's argument that Higgs could have effectively presented his arguments regarding the FBI toxicology report by merely cross-examining Montgomery. An effective cross-examination itself requires time and preparation.

For the reasons set forth above, I dissent and would reverse the judgment based on the fact that the district court abused its discretion when it denied Higgs' motion to continue.

ANTHONY FERNANDEZ, APPELLANT, *v.* JENNIFER FERNANDEZ, NKA JENNIFER ROTHMAN, RESPONDENT.

No. 51423

February 4, 2010 222 P.3d 1031

Appeal from a district court post-decree order denying appellant's motion to modify child support. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Father filed motion to modify child support. The district court denied motion. Father appealed. The supreme court, PICKERING, J., held that: (1) stipulation entered between parties incident to divorce in which they each waived the right to seek modification of a child support order even in the event of changed circumstances was unenforceable on public policy grounds, (2) mother's purported part performance of stipulation in which parties agreed not to seek upward or downward modification of father's child support obligation did not serve to estop father from contesting the stipulation's enforceability, and (3) father was required to establish changed circumstances for purposes of seeking downward modification of child support.

Reversed and remanded.

Radford J. Smith, Chtd., and *Radford J. Smith*, Henderson, for Appellant.

Lemons Grundy & Eisenberg and *Robert Eisenberg*, Reno; *Ecker & Kainen, Chtd.*, and *Andrew L. Kynaston*, Las Vegas, for Respondent.

1. CHILD SUPPORT.

   Stipulation entered between parties incident to divorce, in which they each waived the right to seek modification of a child support order even in the event of changed circumstances, was unenforceable on public policy grounds, such that father was entitled to seek downward modification based on significant decrease in income; so long as the statutory criteria for modification was met, trial court had the power to modify the existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary. NRS 125B.145(1)(b), (4).

2. CHILD SUPPORT.

   A trial court in a marital dissolution action has jurisdiction to determine custody and support of the parents' minor children and to award child support even though the parents have agreed none should be paid. NRS 125.510, 125B.080.

3. CHILD SUPPORT.

   The formula and guideline statutes are not designed to produce the highest child support award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed. NRS 125B.080(6), 125B.145(4).

4. CHILD SUPPORT.
   Court-ordered child support is not a fixed obligation but one that is subject to readjustment as circumstances may direct, and the court's power of adjustment is not limited to changes in the children's favor.
5. CHILD SUPPORT.
   A nonmodifiable child support obligation does not serve the child's best interests where the obligor parent's changed circumstances make the award unreasonable.
6. CHILD SUPPORT.
   Although the trial court has discretion in how it applies the child support statutes, it commits legal error when it misinterprets or fails to follow the statutes as written. NRS 125B.002 *et seq*.
7. CHILD SUPPORT; ESTOPPEL.
   Mother's purported part performance of stipulation in which parties agreed not to seek upward or downward modification of father's child support obligation did not serve to estop father from contesting the stipulation's enforceability in modification proceedings; the promises that were exchanged, by which the parties reciprocally waived the right to seek modification, were corresponding equivalents that could not be separated, and estoppel was not available to resurrect a contract right that was invalid on public policy grounds.
8. CHILD SUPPORT.
   On remand for reconsideration of father's motion for downward modification of his child support obligation, passage of three years since entry of support order, by itself, could not serve as ground for modifying support; instead, father was required to establish occurrence of changed circumstances, specifically, that the significant drop in his income, and increase in mother's income, constituted changed circumstances warranting modification. NRS 125B.070, 125B.080.
9. CHILD SUPPORT.
   Although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order. NRS 125B.070, 125B.080.

Before PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This is an appeal by the father of minor children from an order denying a motion to modify child support under NRS 125B.145. The trial court held that it was ''not bound'' by NRS 125B.145 because the parties ''previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support.'' In the trial court's view, this made the child support order nonmodifiable, so long as the father had ''sufficient means (assets and/or income) to meet the agreed upon child support obligations.''

The motion to modify alleged that the father's monthly gross income had dropped more than 80 percent, to the point his child

support obligation exceeded it. The mother's circumstances, meanwhile, had improved to the extent that her assets and gross monthly income equaled or outmatched his. Declining to apply NRS Chapter 125B's modification provisions to these facts was error. Stipulated or not, the obligation the father sought to modify was incorporated and merged into the decree as an enforceable child support order. State and federal statutes give child support orders super-legal reach. Because children's needs and parents' circumstances can change unpredictably over the life of a child support order, NRS Chapter 125B provides for their periodic review and modification—up or down—as changed circumstances dictate. The statutory scheme does not admit a child support order that cannot be modified based on a material change in circumstances.

The father's motion presented facts that, if true, qualified for relief. He did not need to wait until he was missing court-ordered child support payments or in financial peril before being heard under NRS 125B.145 and its related statutes, NRS 125B.070 and NRS 125B.080. We therefore reverse and remand.

I.

The parties had two children during their brief marriage, which ended in a joint petition for divorce that was granted in August 1998. At the time they divorced, the couple owned two houses free and clear and had no community debt of consequence. They worked in the securities industry, he as a day trader and she in administrative support; both held series 7 (general securities representative) licenses.

The original divorce decree divided the houses and other property between the couple and awarded them joint legal custody of the children, giving primary physical custody to the mother. In addition to alimony, the decree obligated the father to provide health insurance and to pay any uncovered medical expenses for the children, to pay for a housekeeper and either a nanny or day care, and to pay child support of $3,000 per month. Although it stated the child support was ''consistent with the provisions of NRS 125B.070,'' in fact the award exceeded NRS 125B.070's presumptive maximum.[1] Since it did, the decree should have included findings as to the bases for the upward deviation, but didn't.

Roughly a year later, in July 1999, the trial court approved a stipulation and order to modify the decree. The modification in-

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[1]NRS 125B.070 and NRS 125B.080 set presumptive limits on child support, keyed to the number of children and the obligor parent's gross monthly income, with a $100 minimum and $800 maximum per child per month, adjusted to the Consumer Price Index. NRS 125B.070(1)(b) requires that a support order that departs from the formula requires ''findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080,'' which provides:

creased the father's monthly child support obligation from $3,000 to $4,000, to take effect two years later, in July 2001, and continue until the younger child reached age 18. It also added a provision requiring the father to pay for ''private elementary (including preschool and kindergarten) and secondary school at a mutually agreed upon private school in Las Vegas, Nevada.'' The modified decree recited that the increased ''child support obligation is consistent with the provisions of NRS 125B.070 and NRS 125B.080(9).'' Again, it didn't include findings to explain the bases for awarding more support than the presumptive statutory guideline amounts.[2]

Another year passed in which the parties tried but failed at reconciliation. In June 2000, they returned with a new stipulation and order, which the court approved, again modifying the divorce decree. This stipulation and order replaced the mother's primary physical custody of the children with joint physical custody in both parents. Although it left the amount of the child support obligation unchanged,[3] it was this stipulation and order that purportedly made the child support obligation nonmodifiable, stating that both parties ''voluntarily waive any right they may have pursuant to Chapter 125B of the Nevada Revised Statutes to seek a modification to [father's] child support obligation to [mother].'' The waiver was absolute, with one exception: If the mother relocated outside of Nevada with the children without the father's consent, the father could seek to modify support.[4]

> If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:
>
> (a) Set forth findings of fact as to the basis of the deviation from the formula; and
>
> (b) Provide in the findings of fact that amount of support that would have been established under the applicable formula.

NRS 125B.080(9) lists the permitted factors for deviating from NRS 125B.070's guidelines.

[2]The parties' respective appellate attorneys did not represent them in the trial court when the original decree was entered and later modified.

[3]If the change from primary physical custody with the mother to joint physical custody with both parents affected the presumptive child support obligation as calculated under the guidelines in NRS 125B.070 and NRS 125B.080, *see Wright v. Osborn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), and therefore the amount by which the support ordered deviated from the guidelines, this wasn't stated.

[4]The trial judge sua sponte struck this condition as contrary to public policy. On appeal, the mother offers to have the condition reinstated if this will defeat the father's argument that this removed part of the consideration for agreeing to waive statutory modification rights. Because we conclude the stipulation's waiver provision is unenforceable, we do not address this aspect of it separately.

The father filed the motion to modify underlying this appeal in 2007. The trial court declined to review the motion under NRS 125B.145. Instead, it ordered a limited hearing to address whether the waiver made the child support order nonmodifiable.

At the hearing, the trial court heard testimony from the father and reviewed current affidavits of financial condition from both parents. Acknowledging that the father's and mother's financial pictures had inverted since child support had been set, the trial court found that, ''based on each [party's] purported current income, were the Court to apply the child support formula set forth in NRS 125B.070, . . . neither party would be obligated to pay child support to the other.'' Even so, the trial court denied the father's motion to modify. It held that ''the child support provisions of the [decree and its stipulated modifications] shall not be disturbed by the Court based upon the waivers of the parties set forth therein and upon the fact that [the father] still has the ability to pay said amount from his currently held assets.'' Elaborating, it decreed that ''the Court is not bound by the provision of NRS 125B.145 where the parties have previously agreed in a stipulation and order modifying the Decree of Divorce that neither party will seek modification of child support.''

Because it found the child support order nonmodifiable, the trial court did not fully hear or make findings on the alleged bases for statutory modification. We likewise make no findings, but for purposes of assessing whether they merited further proceedings, we accept arguendo the following proffered facts as true: By 2007, when the father filed the motion to modify, his child support obligations amounted to $80,000 a year ($48,000 in monthly child support payments, $30,000 per year in private school tuition, plus insurance and uncovered medical expenses). In his banner years in the stock market (1995-2001), the father had earned sums ranging from $500,000 in the late 1990s to more than $4,000,000 in 2001. He began losing heavily in the market in 2002. With an adverse report already on his industry record, his losses eventually cost him the leverage needed to trade at the high levels he had. By 2007, he no longer traded and was earning $3,000 a month selling cars, plus interest of like amount on retained assets. The lavish second home he'd bought in Malibu had been sold, and the lion's share of his wealth had gone to retire margin debt. Last but not least, he had remarried, then either divorced or separated, and had a new child to support.

On the mother's side, she had remarried too. Although she no longer worked outside the home, her 2007 affidavit of financial condition showed passive and earned income equal to the father's, taking into account her new husband's earnings. Her household also had an additional child to support, her stepson.

The parties had comparable net worth. Each had recently sold the home s/he had received in the divorce. With the proceeds from these sales, both had mostly liquid net assets of between $1,000,000 and $1,500,000, hers being somewhat higher than his.

II.

[Headnote 1]

This appeal presents the question of whether parents can, by stipulation, eliminate or abridge a trial court's statutory authority to review and modify a child support order. The mother maintains, as she did in the trial court, that the parties' agreement to nonmodifiable child support should be upheld as a matter of contract law and equity, based on her part performance. In her view, public policy has no place in the analysis when a nonmodifiability provision is invoked to prohibit downward, as opposed to upward, modification of child support.

The father sees the issue differently. In his view, when the parties incorporated the support agreement into the decree, it ceased being a matter of private contract and became a judicially imposed obligation, at which point the statutory modification provisions apply, notwithstanding the parties' agreement to the contrary.[5] He emphasizes that the statutes do not distinguish between upward and downward deviations from the formula amounts, nor do they expressly permit parties to stipulate to nonmodifiable child support orders. Relying on NRS 125B.145(1)(b), he urges that the award should have been modified to conform to the formulas in NRS 125B.070 and NRS 125B.080 without regard to changed circumstances, since more than three years had passed since the award's last review; failing that, he urges that he demonstrated sufficient change in circumstances to warrant modification.

The father has the better side of the argument on modifiability. While *Rivero v. Rivero*, 125 Nev. 410, 433, 216 P.3d 213, 229

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[5]The mother does not dispute that the child support order and its stipulated modifications, including its provision waiving the right to seek modification, were incorporated and merged into the decree. This dispositively distinguishes *Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980), which was prosecuted ''solely [as a] breach of contract action'' and upheld a contract term for nonmodifiable support in a case in which the agreement was ''neither incorporated in nor merged in the judgment and decree of the trial court.'' *See Day v. Day*, 80 Nev. 386, 395 P.2d 321 (1964) (a spousal support agreement is merged into the divorce decree and loses its character as an independent agreement unless both the agreement and decree direct the agreement's survival (distinguishing *Ballin v. Ballin*, 78 Nev. 224, 371 P.2d 32 (1962))). Whether and to what extent the ''merger'' distinction drawn in cases like *Renshaw* is supportable under modern child support statutes has been questioned, *Mazza v. Hollis*, 947 A.2d 1177, 1180-81 (D.C. 2008), but that issue is not before the court.

(2009), forecloses the father's contention that the mere passage of time entitles him to modification without regard to changed circumstances, his primary argument—that the stipulation waiving the right to seek modification of a support order for changed circumstances as provided in NRS 125B.080(3) and NRS 125B.145(4) is unenforceable—is correct. We conclude that so long as the statutory criteria for modification are met, a ''trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary.'' *In re Marriage of Alter*, 89 Cal. Rptr. 3d 849, 852 (Ct. App. 2009).

A.

[Headnote 2]

Nevada's child support statutes do not directly address whether parents can stipulate to a nonmodifiable child support order. However, they inarguably establish that child support involves more than private contract. By law, ''[t]he parents of a child . . . have a duty to provide the child necessary maintenance, health care, education and support.'' NRS 125B.020(1). This duty ''is discharged by complying with a court order for support or with the terms of a judicially approved settlement.'' NRS 125B.120(1). A trial court in a marital dissolution action has jurisdiction to determine custody and support of the parents' minor children, NRS 125.510; NRS 125B.080, and to award child support even though the parents have agreed none should be paid. *Atkins v. Atkins*, 50 Nev. 333, 336-37, 259 P. 288, 288-89 (1927) (citing Nev. Rev. Laws § 5840 (1912), a precursor to NRS 125.510), *partial abrogation recognized in Lewis v. Hicks*, 108 Nev. 1107, 1111-12, 843 P.2d 828, 831 (1992).

Although parents often stipulate to an appropriate child support order, even agreed-upon child support orders must be calculated and reviewed under the statutory child support formula and guidelines in NRS 125B.070 and NRS 125B.080. Thus, NRS 125B.080(2) provides that, if parents agree to a child support order, they ''shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070.'' ''[I]f the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with [NRS 125B.080(9)] which justify the deviation to the court, and the court shall make a written finding thereon.'' NRS 125B.080(2). The factors listed in NRS 125B.080(9) as permitting deviation—whether ''greater or less than [the formula] amount,'' NRS 125B.080(6)—are exclusive, not illustrative. *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996); *Lewis*, 108 Nev. at 1111, 843 P.2d at 831.

The trial court has continuing jurisdiction over its child support orders. *See* NRS 125.510(1)(b) (once having determined custody, a trial court may ''[a]t any time modify or vacate'' its support and custody orders). NRS 125B.145(4) declares that ''[a]n order for the support of a child may be reviewed at any time on the basis of changed circumstances'' and adds that a change of 20 percent or more in a child support obligor's gross monthly income ''*shall* be deemed to constitute changed circumstances *requiring* a review for modification of the order for the support of a child.''[6] (Emphases added.) Further, upon the request of a parent or legal guardian, ''[a]n order for the support of a child *must* . . . be reviewed by the court at least every 3 years . . . to determine whether the order should be modified or adjusted.'' NRS 125B.145(1)(b) (emphasis added). Finally, NRS 125B.145(2)(b) specifies that, ''[i]f the court . . . [h]as jurisdiction to modify the order and, taking into account the best interests of the child, determines that modification or adjustment of the order is appropriate, the court *shall* enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080.'' (Emphasis added.)

Although Nevada child support laws contain plain language applying their formula and guideline provisions to parents who stipulate to court-ordered child support, the modification statutes say nothing about whether parties can stipulate around them or, indeed, about parental agreements at all. Had the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145, as Connecticut did with its support modification statute. *See Amodio v. Amodio*, 743 A.2d 1135, 1143 (Conn. App. Ct. 2000) (discussing Conn. Gen. Stat. § 46b-86(a), which provides for modification based on changed circumstances ''unless and to the extent that the decree precludes modification''). It didn't. Instead, the Nevada Legislature enacted the broadly unqualified modification statutes excerpted above. Because a child support order affects the child's interests, as much or more than the parents', we are disinclined to find that a parent can waive the modification statutes' protections. We thus interpret the modifica-

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[6]The provision equating a 20-percent change in income with ''changed circumstances'' was added to NRS 125B.145 in 2003. 2003 Nev. Stat., ch. 96, § 2, at 546. Although the amendment postdated the stipulated order in this case, it applies to the motion to modify, since it clarified an existing statute, Norman J. Singer and J.D. Shambie Singer, 1A *Sutherland Statutory Construction* § 22.34 (7th ed. 2009), and is being invoked prospectively, to child support payments not yet due when the motion to modify was filed. *See Ramacciotti v. Ramacciotti*, 106 Nev. 529, 532, 795 P.2d 988, 990 (1990).

tion statutes to mean what they say, with no implied judicial exceptions. The purport of these statutes, as their unqualified language suggests, is that ''the jurisdiction of the court never ends in a support matter, as long as the child is supposed to be getting support. If there is a significant change in circumstances in the parties' relative earning capacity, that can always be brought back to the court, and should be.'' Hearing on A.B. 3 Before the Senate Comm. on Judiciary, 65th Leg. (Nev., May 10, 1989) (Assemblyman Robert Sader's testimony).

Most courts agree that, absent a contrary statutory directive, public policy prevents a court from enforcing a purportedly nonmodifiable child support order, even if the parties stipulate to it. *See Armstrong v. Armstrong*, 544 P.2d 941, 943 (Cal. 1976) (''When a child support agreement is incorporated in a child support order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement's language to the contrary''); *Phillips v. Phillips*, 186 P.2d 102, 103 (Kan. 1947) (parties cannot by agreement oust the court of its continuing statutory jurisdiction over child support by agreeing to a nonmodifiable child support order); *Grimes v. Grimes*, 621 A.2d 211, 213-14 (Vt. 1992) (canvassing cases and holding unenforceable as a matter of public policy ''parental agreements prohibiting or limiting the power of the court to modify child support in the future''); *Frisch v. Henrichs*, 736 N.W.2d 85, 101 (Wis. 2007) (''stipulation, which set a ceiling on child support and prevented modification in the level of child support, is not enforceable and offends public policy''); *Lang v. Lang*, 252 So. 2d 809, 812 (Fla. Dist. Ct. App. 1971) (public policy prohibits a nonmodifiable child support order); *In re Marriage of Rife*, 878 N.E.2d 775, 787 (Ill. App. Ct. 2007) (support modification statute's plain language preserved the court's authority to modify child-related provisions of the judgment, precluding any agreement to waive the right to seek child support adjustments).[7]

The mother invites us to distinguish between the children's and the parents' interests. She concedes that public policy may prohibit a ceiling on child support, since parents cannot contract away a

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[7]Although not precisely on point, we recognized as much in *Willerton v. Bassham*, 111 Nev. 10, 25-27, 889 P.2d 823, 832-33 (1995), which concerned whether a stipulated judgment in a paternity suit prevented later judicial modification of the support adjudication. Rejecting the argument that the finality of stipulated judgments made the agreed-upon support obligation nonmodifiable, the court held that ''the state has a compelling interest in seeing that any provisions for the support of a child incorporated in . . . settlement agreements are modifiable.'' *Id.* at 24, 889 P.2d at 832. The court characterized NRS Chapter 125B's modification provisions as ''protections'' that cannot be waived or avoided by agreement. *Id.* at 26, 889 P.2d at 833.

child's right to increased support if the child's needs require it. However, she argues for a different rule where a support obligor seeks a downward adjustment in child support based on changed parental circumstances. Reasoning that more support will always serve a child's interests better than less, she urges that public policy supports nonmodification agreements when applied to preclude downward modification, no matter the impact on the obligor parent who, after all, agreed to the order in the first place.

There are multiple problems with this argument, including a threshold one: The stipulated order here was general; it did not just set a floor on child support, but also a ceiling. Both parents gave up the right to seek modification—upward or downward—no matter whose circumstances changed, be it the mother's, the father's, or the children's. Enforcing the stipulation against the father's request for downward modification sanctions its enforcement against the mother seeking upward modification. The promises were inseparably paired ''corresponding equivalents,'' which takes partial enforcement off the table. *See* Restatement (Second) of Contracts § 184 cmt. a (1981); Grace McLane Giesel, 15 *Corbin on Contracts* § 89.6 (rev. ed. 2003).

[Headnote 3]

More fundamentally, neither our statutes nor public policy supports the argument that more court-ordered child support is always better for the child than less. The formula and guideline statutes are not designed to produce the highest award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed. *See Barbagallo v. Barbagallo*, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989) (''what really matters'' under the formula and guideline statutes ''is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves''), *partially overruled on other grounds by Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), *as recognized in Rivero v. Rivero*, 125 Nev. 410, 437, 216 P.3d 213, 232 (2009). This is evident in NRS 125B.080(6), which requires findings to support deviations from the formula—whether the deviation ''is greater or less'' than the guideline amount; and in NRS 125B.145(4), which defines ''changed circumstances'' for modification review purposes as ''a change of 20 percent or more in the gross monthly income'' of the support obligor, whether the 20-percent change was up or down.

The statutes do not equate the child's best interests with perpetuating a supererogatory support order the obligor parent can no

longer meet. Our child support statutes, like those in sister states, recognize that

> parents' circumstances are subject to adversities out of their control. A serious accident, catastrophic illness, or a flagging economy and the hard times that go along with it, can all interpose a reversal of fortune that would make it impossible to satisfy a pre-set level of child support. *In such a situation, it would not be in a child's best interest to force the parent into a level of debt he or she has no ability to pay*. . . . We conclude, therefore, that the court always has the power to modify a child support order, upward or downward, regardless of the parents' agreement to the contrary.

In re Marriage of Alter, 89 Cal. Rptr. 3d 849, 858 (Ct. App. 2009) (emphasis added). *Accord Grimes v. Grimes*, 621 A.2d 211, 214 (Vt. 1992) (''There is a practical side to this issue [since a] clearly excessive child support order may lead . . . to collection difficulties and periodic returns to court''; ''[a] support amount that, on paper, appears generous to the children becomes illusory if, for reasons related to the excessive size of the payments, collection must be coerced on a regular basis.''); *Krieman v. Goldberg*, 571 N.W.2d 425, 432 (Wis. Ct. App. 1997) (to ''subject a payor parent to an unreviewable stipulation for child support could jeopardize the payor parent's financial future, may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child'').

[Headnotes 4, 5]

Parents of course are free to—and often do—provide support to their children in sums greater than the statutes require. But this case involves a child support order, enforceable by contempt and intended by both parents to satisfy their legal obligations of support. When agreed-upon support is incorporated into a decree, it becomes a court order. Court-ordered child support is ''not a fixed obligation but one that is subject to readjustment as circumstances may direct, and the court's power of adjustment is not limited to changes in the children's favor.'' *Riemer v. Riemer*, 73 Nev. 197, 199, 314 P.2d 381, 383 (1957). ''There is no merit in th[e] contention'' that a nonmodifiable child support obligation serves the child's best interests where, as here, the obligor parent's changed circumstances allegedly make the award unreasonable. *Id*.

[Headnote 6]

The trial court created its own modification standard when it justified its decision by the fact that the father still had assets he could use to pay child support, even if the support obligation ex-

ceeded his gross income. The parents' relative financial means may play a legitimate role in determining the amount of an original or modified support award. *Lewis v. Hicks*, 108 Nev. 1107, 1114 n.4, 843 P.2d 828, 833 n.4 (1992). However, the modification statutes do not support the exhaustion-of-assets test the trial court fashioned for determining whether to allow modification. The test the trial court fashioned is closer to the ''undue hardship'' standard in the enforcement statutes, *see* NRS 125B.140(2)(c), than the changed circumstances standard in the modification statutes. Although the trial court has discretion in how it applies the child support statutes, it commits legal error when it misinterprets or fails to follow the statutes as written, which is what occurred here. *Id.* at 1112, 843 P.2d at 831.

B.

[Headnotes 7, 8]

Because the trial court erred in declaring the modification statutes not applicable to the father's motion, we reverse and remand for proceedings under NRS 125B.145(4), NRS 125B.070, and NRS 125B.080. Two final issues remain. First, the mother maintains that her part performance of the nonmodifiability stipulation estops the father from contesting its enforceability. We disagree. The property settlement between the parties was concluded and the support obligations were set before the stipulation and order waiving modification rights was entered. The promises that were exchanged—by which the parties reciprocally waived the right to seek modification—were corresponding equivalents that can't be separated. *See* Restatement (Second) of Contracts § 184 (1979). In these circumstances, estoppel is not available to resurrect a contract right public policy invalidates. *Krieman*, 571 N.W.2d at 430-32.

[Headnote 9]

The second issue concerns the scope of the proceedings on remand. This case was briefed before *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), was decided. *Rivero* states that, ''although a party need not show changed circumstances for the district court to *review* a support order after three years, *changed circumstances are still required for the district court to modify the order*.'' *Id.* at 433, 216 P.3d at 229 (emphases added). This language forecloses the father's argument that NRS 125B.145(1)(b) entitles him to have the child support order modified to conform to NRS 125B.070 and NRS 125B.080, simply because more than three years passed since its last review.[8] To prevail on his modifi-

[8]NRS 125B.145(1)'s provision for review of child support orders every three years was added to meet federal mandates, *see* 42 U.S.C. § 666(a)(10).

cation motion on remand, *Rivero* requires the father to demonstrate changed circumstances. *Id*. Because the parties did not stipulate facts to justify deviating from the formulas and the court did not specify findings to support the initial or modified child support order, opting instead to just recite compliance with NRS 125B.070 and NRS 125B.080(9), the bases for the historical deviation from the formula amounts will have to be reconstructed, unless the father's alleged change in income, which appears to satisfy NRS 125B.145(4), is proved. *See supra* note 6.

In their supplemental briefs addressing *Rivero*, the parties express confusion over its emphasis on NRS 125B.145(2)(b), which refers to the trial court ''taking into account the best interests of the child [in] determin[ing] that modification or adjustment of the order is appropriate.'' *Rivero*, 125 Nev. at 433, 216 P.3d at 229. The same public policy considerations that lead us to reject the argument that a downward modification cannot be in the child's best interest answer this concern. Unlike the custody setting, in which NRS 125.480(1) makes the best interest of the child ''the sole consideration,'' in the support setting the parents' and the child's best interests are interwoven. NRS 125B.145(2)'s reference to ''taking into account the best interests of the child'' originated in the same set of federal mandates that, in 1997, led to the adoption of NRS 125B.145(1)'s three-year review provision and was a direct lift from 42 U.S.C. § 666(10)(A)(i). Hearing on A.B. 401 Before the Assembly Comm. on Judiciary, 69th Leg., Ex. C (Nev., May 13, 1997) (Leg. Counsel Bureau Report, Background Information Regarding the Federal Welfare Reform Law and Child Support Enforcement, Attachment B). It did not change the preexisting legislative judgment that, if changed circumstances merit modification, revising the award to conform to the formula guidelines presumptively meets the child's needs. *See* NRS 125B.080(5); NRS 125B.145(4) (formerly NRS 125B.145(2)). The child's best interest, in the support setting, is tied to the goal of the support statutes generally, which is to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents' relative financial means. *Lewis*, 108 Nev. at 1114 n.4, 843 P.2d at 833 n.4 (citing *Barbagallo*, 105 Nev. at 551 n.4, 779 P.2d at 536 n.4). The child's best interest is not served by perpetuating a support order that the obligor parent's changed circumstances may make unreasonable, especially when, as alleged here, the receiving parent's financial circumstances have materially improved. We

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Other states have interpreted their comparable periodic review statutes as not requiring changed circumstances for modification. *Allen v. Allen*, 930 A.2d 1013 (Me. 2009); *see also* NRS 125B.080(3).

therefore reverse and remand for further proceedings consistent herewith.

PARRAGUIRRE, C.J., and DOUGLAS, J., concur.

JOHANNE DICTOR, DBA CPCI, APPELLANT, *v.* CREATIVE MANAGEMENT SERVICES, LLC, DBA MC2, RESPONDENT.

No. 51778

February 4, 2010 223 P.3d 332

Appeal from a district court order granting summary judgment in an insurance action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Property insurer brought subrogation claim against trade show company after trade show vendor filed property claim with its insurance carrier and its insurance company then subrogated the claim to property insurer. The district court granted summary judgment in favor of trade show company. Insurer appealed. The supreme court reversed and remanded. On remand, the district court granted summary judgment in favor of trade show company. Insurer appealed. The supreme court, HARDESTY, J., held that: (1) law-of-the-case doctrine did not preclude district court from considering statutory defense under Missouri law, and (2) Missouri law applied to dispute.

Affirmed.

Robert M. Apple & Associates and *Robert M. Apple*, Las Vegas; *Law Offices of Cary L. Dictor* and *Cary L. Dictor*, San Leandro, California, for Appellant.

Pico Rosenberger and *James R. Rosenberger*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   An order granting summary judgment is reviewed by the supreme court de novo.
2. JUDGMENT.
   Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and there is no genuine dispute of any material fact.
3. COURTS.
   The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case.

4. COURTS.
   In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication.
5. APPEAL AND ERROR; COURTS.
   The law-of-the-case doctrine does not bar a district court from hearing and adjudicating issues not previously decided and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal.
6. APPEAL AND ERROR.
   Supreme court's previous determination that Nevada statutory defense did not apply to insurance dispute did not bar district court from considering statutory defense under Missouri law under law-of-the-case doctrine, where previous order did not explicitly or impliedly decide whether Missouri law was applicable. NRS 687A.095.
7. INSURANCE.
   Missouri law that acted as statutory bar to subrogation claims against an insured of an insolvent insurer applied to insurance dispute between insured of an insolvent insurer and property insurer, where insured was domiciled in Missouri and thus qualified for protection under Missouri Property and Casualty Insurance Guaranty Association Act and insurer submitted to the statutes of that domicile through its assignor. Restatement (Second) of Conflict of Laws § 161.
8. ACTION.
   When conducting a choice-of-law analysis, a district court should not apply the most significant relationship test embodied in the factors in section 6 of the Restatement (Second) of Conflict of Laws until it has determined whether a more specific section of the Restatement applies.
9. SUBROGATION.
   A subrogation claim arising from a tort is properly characterized as a tort claim for choice of law purposes.

Before PARRAGUIRRE, C.J., HARDESTY and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider two legal doctrines: first, the application of the law-of-the-case doctrine, and second, the proper choice-of-law analysis for defenses to the subrogation of underlying tort claims.

When an appellate court explicitly or by necessary implication determines an issue, the law-of-the-case doctrine provides that the determination governs the same issue in subsequent proceedings in the same case. Because our unpublished order in a previous appeal involving these same parties and stemming from the same lower court case narrowly addressed a single issue, we conclude that the district court did not violate the law-of-the-case doctrine and the district court was not precluded from applying the Missouri Property and Casualty Insurance Guaranty Association Act, Missouri

Revised Statute section 375.772 (Mo. Rev. Stat. § 375.772), and other alternate legal defenses on remand. We also affirm the district court's choice-of-law conclusion, that the Missouri statute barring tort claims against an insured of an insolvent insurer precludes appellant CPCI's subrogation claims.

FACTS

Creative Management Services, Inc., has its principal place of business in Missouri but provides services and support to trade shows in Las Vegas. In June 2000, Loews Corporation was a vendor at a trade show in Las Vegas, and its watches and other items valued at approximately $120,000 were stolen. Loews filed a property claim with its insurance carrier, Hartford Insurance Company, which paid the claim. Hartford then subrogated the claim to CPCI, a California corporation.

CPCI brought a subrogation claim against Creative asserting various causes of action, including negligence and conversion, for the loss of Loews's property. At the time of the trade show, Creative was insured by Reliance Insurance Company, which has since been declared insolvent.

In 2004, Creative filed its first motion for summary judgment. The district court granted the motion based on NRS 687A.095 in the Nevada Insurance Guaranty Association Act, which provides immunity from suits to an insured of an insolvent insurer. The district court concluded that the subrogation claim was barred because Creative was an insured of Reliance, which had been declared insolvent. CPCI appealed. Days prior to the scheduled oral argument in that appeal, an amicus curiae brief was filed asserting that, through a choice-of-law analysis, Mo. Rev. Stat. § 375.772, which also precludes suits against an insured of an insolvent insurer, should apply. In that appeal, we determined that NRS 687A.095 did not apply to this case because the claim was not a ''covered claim'' under NRS 687A.033, which requires that either the claimant or the insured be a resident of Nevada.[1] Therefore, we reversed the district court's summary judgment and remanded the matter for further proceedings. Our order, however, was silent regarding a choice-of-law analysis and the application of Mo. Rev. Stat. § 375.772.

On remand, Creative filed its second motion for summary judgment, asserting that because NRS 687A.095 is not applicable, the district court should apply a choice-of-law analysis and conclude that Mo. Rev. Stat. § 375.772 bars CPCI's suit against an insured of an insolvent insurer. After conducting a choice-of-law analysis

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[1]*CPCI v. Creative Management Services*, Docket No. 44068 (Order of Reversal and Remand, January 12, 2007).

under *General Motors Corp. v. District Court*, 122 Nev. 466, 134 P.3d 111 (2006), the district court determined that Mo. Rev. Stat. § 375.772 applied and granted Creative's second motion for summary judgment. CPCI appeals.

DISCUSSION

In this appeal, we must first determine whether, under the law-of-the-case doctrine, our previous unpublished order in this case precludes Creative from asserting Mo. Rev. Stat. § 375.772 as an additional statutory defense to the underlying tort claims. If the law-of-the-case doctrine does not bar Creative from asserting Mo. Rev. Stat. § 375.772, then we must determine whether the district court properly conducted a choice-of-law analysis and, thereafter, correctly applied Mo. Rev. Stat. § 375.772 to dismiss CPCI's complaint.

[Headnotes 1, 2]

An order granting summary judgment is reviewed by this court de novo. *Ozawa v. Vision Airlines*, 125 Nev. 556, 560, 216 P.3d 788, 791 (2009). Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and there is no genuine dispute of any material fact. *Id.*

The law-of-the-case doctrine

In this appeal, CPCI argues that the issue in the prior appeal broadly answered the question whether there was a statutory defense precluding the litigation of the underlying claims. If so, CPCI maintains that the law-of-the-case doctrine prevents this same issue from being argued to the district court again. Specifically, CPCI claims that our previous order—holding that NRS 687A.095 was not applicable—also resolved the vast horizon of possible statutory defenses that could have been raised in this case, including Mo. Rev. Stat. § 375.775, and required the district court to proceed to trial. We disagree.

[Headnotes 3-5]

The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case. *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007); *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication. *Snow-Erlin v. U.S.*, 470 F.3d 804, 807 (9th Cir. 2006). However, the doctrine does not bar a district court from hearing and adjudicating issues not previously decided, *see id.*, and does not apply if the issues presented in a subsequent

appeal differ from those presented in a previous appeal. *Emeterio v. Clint Hurt and Assocs.*, 114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998); *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir. 1990) (''Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default.'')

[Headnote 6]

Here, we conclude that the district court could entertain a renewed summary judgment motion based on an alternate statutory defense. Our previous order was narrow and strictly determined that NRS 687A.095 did not apply to this case because the claim was not a covered claim under NRS 687A.033, which requires that either the claimant or insured be a resident of Nevada. Neither CPCI nor Creative is a resident of Nevada. As a result, we ordered the district court to conduct further proceedings. Although the application of Mo. Rev. Stat. § 375.772 was presented in the amicus brief filed days prior to the oral argument in the previous appeal, our order did not explicitly or impliedly decide whether Mo. Rev. Stat. § 375.772 was applicable. Pursuant to the law-of-the-case doctrine, NRS 687A.095 cannot be applied as a statutory defense to the underlying claims. However, our prior order did not compel the district court to proceed to trial, nor did it preclude the district court from addressing alternate statutory defenses or other pretrial dispositional motions.[2] Because our previous order did not determine the applicability of Mo. Rev. Stat. § 375.772 or other possible legal defenses, we conclude that the law-of-the-case doctrine did not bar the district court from considering alternate legal defenses through another motion for summary judgment.[3] *See also Hoffman v. Tonnemacher*, 593 F.3d 908, 912 (9th Cir. 2010) (the rules do not prohibit successive summary judgment motions if appropriate).

Choice-of-law analysis

[Headnote 7]

Because we conclude that the law-of-the-case doctrine does not bar consideration of Mo. Rev. Stat. § 375.772 as a statutory de-

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[2]Notwithstanding appellant's argument in the briefs that our previous order broadly resolved all statutory defenses, at oral argument in this instant appeal, appellant acknowledged that our prior order would not preclude the district court from considering other statutory defenses, such as the statute of limitations, if such defenses were applicable.

[3]CPCI also argues that the application of Mo. Rev. Stat. § 375.772 was an affirmative defense that was not properly pleaded. We conclude that the language in Creative's answer that ''any subrogation claim is barred by NRS 687A.095 and related statutes'' is sufficient to meet the affirmative defense test outlined in *Clark County School District v. Richardson Construction*, 123 Nev. 382, 392, 168 P.3d 87, 94 (2007).

fense, we also conclude that a choice-of-law analysis by the district court was appropriate. The district court looked to *General Motors Corp. v. District Court*, 122 Nev. 466, 134 P.3d 111 (2006), as the guiding authority for a choice-of-law analysis; however, the district court failed to follow the analysis as outlined.

[Headnote 8]

General Motors Corp. adopted the Restatement (Second) of Conflict of Laws as the relevant authority for Nevada's choice-of-law jurisprudence in tort cases and concluded that the most significant relationship test of section 6 of the Second Restatement governs a choice-of-law analysis, ''*unless* another, more specific section . . . applies.'' *General Motors Corp.*, 122 Nev. at 468, 473, 134 P.3d at 113, 116 (emphasis added). Here, the district court immediately applied the section 6 factors without considering whether a ''more specific section'' of the Second Restatement applied.[4] This was error. A district court should not apply the section 6 factors until it has determined whether a ''more specific section'' of the Second Restatement applies.[5]

[Headnote 9]

CPCI's subrogation claim sounds in tort, and to succeed on that claim, CPCI would be required to prove that Creative was negligent. ''A subrogation claim arising from a tort . . . is properly characterized as a tort claim for choice of law purposes.'' *Federated Rural Elec. v. R.D. Moody & Associates*, 468 F.3d 1322, 1326 (11th Cir. 2006). We conclude that section 161 of the Restatement (Second) of Conflict of Laws, which addresses the defenses available in tort actions, is a ''more specific section'' that applies to this case and should be the starting point of a choice-of-law analysis.

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[4]Restatement (Second) of Conflict of Laws section 6 provides in pertinent part:

> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

[5]We also note that courts are not bound to decide all issues in a case under the local law of only one state, but rather each issue should be separately considered and resolved by the applicable law of the potentially interested state. *See* Restatement (Second) of Conflict of Laws § 145 cmt. d (1971).

Section 161 of the Second Restatement declares that ''[t]he law selected by application of the rule of § 145 determines what defenses to the plaintiff's claim may be raised on the merits.'' However, section 161's comments distinguish between defenses raised on the merits of the plaintiff's claim and defenses that arise from the relationship of the parties. Section 161, comment e notes that defenses that excuse ordinary tort liability based on the relationship of the parties may be controlled by the local law where the parties are domiciled. Comment e also refers to section 156, comment f, which describes the exceptions to the choice of law for normal tort liability, recognizing that in certain situations an actor's liability may be relieved because of the parties' relationship and domicile in a state other than the state where the tortious conduct and injury occurred:

> Whether the actor is relieved from ordinary tort liability may, on occasion, depend upon some law other than that which determines whether his conduct is tortious. This is particularly likely to be true in a situation where the actor claims to be relieved from liability because of his particular relationship to the plaintiff, and the parties are domiciled in a state other than that in which the tortious conduct and resulting injury occurred.

Restatement (Second) of Conflict of Laws § 156 cmt. f (1971).

In adopting the Restatement (Second) of Conflict of Laws's analytical approach to control the outcome of a choice-of-law analysis, we determine that additional comments in the Second Restatement support the position that ''the local law of the state where the parties are domiciled, rather than the local law of the state of conduct and injury, may be applied to determine whether one party is immune from tort liability to the other.'' Restatement (Second) of Conflict of Laws § 145 cmt. d (1971); Restatement (Second) of Conflict of Laws § 156 cmt. f (1971) (the law of the state where the driver and passenger are domiciled will apply although the tortious conduct and injury occurred in another state); Restatement (Second) of Conflict of Laws § 167 cmt. c (1971) (the law of the state of the parties' domicile will likely have the greatest interest in the issue of whether tort claims survive the death of one of the parties); Restatement (Second) of Conflict of Laws § 168 cmt. b (1971) (whether a charitable corporation may assert the defense of charitable immunity may be determined by the local law of the state where the plaintiff is domiciled and defendant corporation has its principle place of business).

In this case, Mo. Rev. Stat. § 375.772 is not advanced as a defense to tort liability. Rather, the statute is a defense based on the relationship between an insured and an insolvent insurer. Creative

is an insured of an insolvent insurer, Reliance Insurance Company. Because Creative is domiciled in Missouri, it qualifies for protection under the Missouri Property and Casualty Insurance Guaranty Association Act. *See* Mo. Rev. Stat. § 375.772(2)(7)(b) (West 2002 & Supp. 2009) (requiring that the claimant or the insured be a resident of the state to qualify as a ''covered claim''). We recognize that CPCI and Creative do not have a direct relationship; however, CPCI is the assignee of Hartford Insurance Company, an insurer whose claims against Creative are also subject to the Missouri Property and Casualty Insurance Guaranty Association Act. Although section 161, comment e implies that the parties' domicile should be shared in order for the local law of the domicile to control, in this case, Creative's domicile alone and CPCI's submission to the statutes of that domicile through its assignor, Hartford, are sufficient to invoke section 161, comment e and apply the Missouri Property and Casualty Insurance Guaranty Association Act.

Although the district court's choice-of-law analysis was procedurally flawed because it did not rely upon a ''more specific section'' of the Restatement (Second) of Conflict of Laws prior to conducting a section 6 analysis, we conclude that the district court's determination that Missouri law applied was correct, and we will not disturb the district court's judgment even though it was reached by relying on different grounds. *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 221, 210 P.3d 190, 196 (2009).

Creative's defense was based on Missouri's statutory bar to subrogation claims against an insured of an insolvent insurer. This defense required the district court to conduct a proper choice-of-law analysis under section 161 of the Second Restatement and apply the local law of at least Creative's domicile where the claimant's subrogation claim was subject to the Missouri Property and Casualty Insurance Guaranty Association Act. Because Creative is an insured of an insolvent insurer, we conclude that Mo. Rev. Stat. § 375.772 bars CPCI's subrogation claim against Creative. Therefore, we affirm the district court's grant of summary judgment.

PARRAGUIRRE, C.J., and PICKERING, J., concur.

RONALD FOSTER; PATRICK COCHRANE; AND FREDERICK DORNAN, APPELLANTS, *v*. TERRY DINGWALL, AN INDIVIDUAL, AND DERIVATIVELY ON BEHALF OF INNOVATIVE ENERGY SOLUTIONS, INC.; MICHAEL HARMAN, SPECIAL MASTER; HYUN IK YANG; AND HYUNSUK CHAI, RESPONDENTS.

No. 50166

February 25, 2010 228 P.3d 453

Motion for remand following the district court's certification of its inclination to grant appellants' NRCP 60(b)(2) motion for relief from the underlying judgment based on newly discovered evidence. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Judgment debtors filed motion for relief from judgment. The district court certified its intent to grant motion. Debtors moved in the supreme court to have the matter remanded for entry of order granting relief from judgment. The supreme court, HARDESTY, J., held that: (1) it would clarify procedure under which party could seek to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from that order or judgment had been perfected in the supreme court; and (2) limitations period for moving for relief from judgment was not tolled by perfection of appeal, as a matter of first impression, disapproving certain language in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).

Motion denied.

Bailus Cook & Kelesis, Ltd., and *Marc P. Cook*, Las Vegas, for Appellants Foster and Cochrane.

Holland & Hart LLP and *J. Stephen Peek, Matthew J. Kreutzer*, and *Janet L. Rosales*, Las Vegas, for Appellant Dornan.

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Dan R. Waite*, Las Vegas, for Respondent Dingwall.

1. APPEAL AND ERROR.

Prior to filing a motion for remand in supreme court, a party seeking to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal should file a motion for relief from the order or judgment in the district court. NRCP 60(b)(2).

2. APPEAL AND ERROR.

Despite general rule that perfection of an appeal divests the district court of jurisdiction to act except with regard to matters collateral to or independent from the appealed order, district court retains a limited ju-

risdiction to review motions made in accordance with procedure in which party seeking to alter, vacate, or otherwise modify an order or judgment challenged on appeal files motion for relief from order or judgment. NRCP 60(b)(2).

3. APPEAL AND ERROR.
   During pendency of appeal, district court considering motion for relief from order or judgment challenged on appeal has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion. NRCP 60(b)(2).
4. APPEAL AND ERROR.
   If, during pendency of appeal, the district court is inclined to grant the relief requested in motion for relief from order or judgment challenged on appeal, then it may certify its intent to do so; at that point, it would be appropriate for the moving party to file a motion, to which the district court's certification of its intent to grant relief is attached, with the supreme court seeking a remand to the district court for entry of an order granting the requested relief. NRCP 60(b)(2).
5. APPEAL AND ERROR.
   Where an appeal is pending and district court certifies intent to grant the relief requested in motion for relief from order or judgment challenged on appeal, supreme court will consider request for a remand and determine whether it should be granted or denied. NRCP 60(b)(2).
6. JUDGMENT.
   Limitations period for a party to move for relief from judgment was not tolled by perfection of appeal; contrary rule could impair the finality of judgments and prolong appellate proceedings that could take months or years to complete, disapproving certain language in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978). NRCP 60(b)(2).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this opinion, we clarify and explain more fully the process, announced in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), for seeking a remand to the district court to alter, vacate, or otherwise modify or change a district court order or judgment after an appeal to this court from that order or judgment has been perfected. We further address a related issue of first impression—whether when an appeal has been taken from a final order or judgment and a party subsequently files a motion in the district court for relief from that order or judgment under NRCP 60(b)(2) in accordance with the *Huneycutt* remand procedure, the perfection of the appeal tolls the six-month time period for seeking NRCP 60(b)(2) relief. For the reasons set forth below, we conclude that the perfection of an appeal does not toll NRCP 60(b)(2)'s six-

month time period for seeking relief. Accordingly, because we conclude that appellants' request for NRCP 60(b)(2) relief was untimely, we deny their motion to remand this matter to the district court.

BACKGROUND

Currently before this court is an appeal, filed by appellants Ronald Foster, Patrick Cochrane, and Frederick Dornan, challenging the final judgment entered in the underlying contracts action. The challenged judgment was filed in the district court on August 29, 2007, and notice of entry of the judgment was served on appellants that same day. On September 7, 2007, Foster, Cochrane, and Dornan timely filed their notice of appeal from the district court's August 29, 2007, final judgment. On July 29, 2009, nearly two years after the challenged judgment was entered by the district court and notice of entry of the judgment was served, Foster and Cochrane filed a motion in the district court, joined by Dornan, seeking relief from that judgment under NRCP 60(b)(2) based on certain newly discovered evidence. Specifically, they sought to have the district court certify its intent to grant their motion for NRCP 60(b)(2) relief so as to allow them to then move this court to remand the matter to the district court in accordance with the procedure established in *Huneycutt* for the entry of an order granting their motion for NRCP 60(b)(2) relief.

After the district court certified its intent to grant appellants' motion over respondents Terry Dingwall and Hyunsuk Chai's oppositions, Foster and Cochrane filed a motion in this court, joined by Dornan, seeking to have the matter remanded to the district court for the entry of an order granting their motion for NRCP 60(b)(2) relief. Dingwall has opposed that motion, joined by Chai, and Foster and Cochrane were subsequently granted permission to file a reply, which they did on December 21, 2009.

DISCUSSION

Because appellants' motion for remand is based on the procedure outlined in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), and because it appears that this procedure is in need of clarification and explanation in light of the cursory analysis provided in *Huneycutt*, we begin our analysis by discussing the proper procedure to be followed when a party seeks to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from that order or judgment has been perfected in this court. We then address the merits of the motion for remand.

Procedure for seeking a remand to district court

This court has repeatedly held that the timely filing of a notice of appeal " 'divests the district court of jurisdiction to act and vests jurisdiction in this court.' " *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) (quoting *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987)). We have further held that

> when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, [but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits.

Mack-Manley, 122 Nev. at 855, 138 P.3d at 529-30. In *Huneycutt*, however, this court adopted a procedure whereby, if a party to an appeal believes a basis exists to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from that order or judgment has been perfected in this court, the party can seek to have the district court certify its intent to grant the requested relief, and thereafter the party may move this court to remand the matter to the district court for the entry of an order granting the requested relief. 94 Nev. at 79-81, 575 P.2d at 585-86.

[Headnotes 1-3]

As outlined in *Huneycutt*, prior to filing a motion for remand in this court, a party seeking to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal should file a motion for relief from the order or judgment in the district court.[1] As demonstrated by our *Huneycutt* decision, despite our general rule that the perfection of an appeal divests the district court of jurisdiction to act except with regard to matters collateral to or independent from the appealed order, the district court nevertheless retains a limited jurisdiction to review motions made in accordance with this procedure. *See Mack-Manley*, 122 Nev. at 855-56, 138 P.3d at 529-30; *Huneycutt*, 94 Nev. at 80-81, 575 P.2d at 585-86. In considering such motions, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion,

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[1]To the extent that *Chapman Industries v. United Insurance*, 110 Nev. 454, 458-59, 874 P.2d 739, 741-42 (1994), indicates that the use of the *Huneycutt* procedure is not necessary when seeking relief through a motion made pursuant to NRCP 50(b), 52(b), or 59, that is true only if the motion was filed in the district court prior to the filing of the notice of appeal. If such a motion is filed after an appeal is perfected, the party seeking relief through such a motion must utilize the clarified *Huneycutt* procedure set forth in this opinion.

and enter an order denying the motion, but lacks jurisdiction to enter an order granting such a motion.[2] *See Huneycutt*, 94 Nev. 79, 575 P.2d 585; *King v. First American Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002) (explaining that federal district courts have jurisdiction to ''entertain and deny'' Rule 60(b) motions while an appeal is pending, but cannot grant such motions without permission from the circuit court); *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 766-67 (8th Cir. 1989) (same). Some of our caselaw implies, however, that the district court lacks the authority to deny requests for relief regarding matters that are not collateral to or independent from the appealed order while the appeal remains pending. *See Mack-Manley*, 122 Nev. at 855, 138 P.3d 529-30; *Kantor v. Kantor*, 116 Nev. 886, 894-95, 8 P.3d 825, 830 (2000); *Rust*, 103 Nev. at 688, 747 P.2d at 1382. We take this opportunity to clarify that the district court *does* have jurisdiction to *deny* such requests. *King*, 287 F.3d at 94; *Federal Land Bank*, 889 F.2d at 766.

[Headnotes 4, 5]

As for the remand procedure, if the district court is inclined to grant the relief requested, then it may certify its intent to do so. *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530; *Huneycutt*, 94 Nev. at 81, 575 P.2d at 586. At that point, it would be appropriate for the moving party to file a motion (to which the district court's certification of its intent to grant relief is attached) with this court seeking a remand to the district court for entry of an order granting the requested relief. *Mack-Manley*, 122 Nev. at 855-56, 138 P.3d at 530; *Huneycutt*, 94 Nev. at 81, 575 P.2d at 586. This court will then consider the request for a remand and determine whether it should be granted or denied. *See Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530 (noting this court's discretion to grant a motion seeking remand to the district court); *see also Post v. Bradshaw*, 422 F.3d 419, 422 (6th Cir. 2005) (noting that appellate courts do not rubber-stamp or grant such motions as a matter of course). If the district court is not inclined to grant the requested relief, however, then as stated above, the district court may enter an order denying the motion.[3] *King*, 287 F.3d at 94; *Federal Land Bank*, 889 F.2d at 766.

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[2]Our conclusion that the district court lacks jurisdiction to enter orders *granting* such requests for relief in no way limits the district court's jurisdiction to make temporary, short-term adjustments to child custody arrangements on an emergency basis as set forth in *Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530.

[3]We note that if the order denying such relief is independently appealable, such as an order denying NRCP 60(b) relief, denying an NRCP 59 new trial motion, or refusing to modify or vacate a child custody arrangement under NRS 125.510(1)(b), any party aggrieved by that order may appeal that order

Foster, Cochrane, and Dornan's motion for remand

[Headnote 6]

In the present matter, the district court has certified its intent to grant appellants' NRCP 60(b)(2) motion for relief from the final judgment in accordance with the procedures outlined above. As a result, Foster, Cochrane, and Dornan now move this court to remand this matter to the district court so that it can enter an order granting the relief requested in their NRCP 60(b)(2) motion. Dingwall opposes the remand motion, arguing that the NRCP 60(b)(2) motion is untimely; Foster and Cochrane have filed a reply asserting, among other things, that their motion was timely.

NRCP 60(b) provides that a motion for relief from a final order or judgment based on newly discovered evidence must ''be made within a reasonable time, and . . . not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served.'' Here, although written notice of entry of the final judgment was served on August 29, 2007, appellants' NRCP 60(b)(2) motion was not filed in the district court until July 29, 2009, well beyond the six-month limitations period for seeking such relief. This raises the issue of whether appellants' pending appeal, which was perfected by the timely filing of a notice of appeal within NRCP 60(b)'s six-month period on September 7, 2007, affects the running of the time limit for seeking NRCP 60(b) relief. In other words, we must determine whether the perfection of this appeal tolled the running of NRCP 60(b)'s six-month time limit.

To resolve this issue, we look to federal caselaw, as this court has recognized that ''federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.'' *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). ''As amended effective January 1, 2005, NRCP 60(b) largely replicates Fed. R. Civ. P. 60(b), as written before the Federal Rules' 2007 revisions.'' *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 650, 218 P.3d 853, 856 (2009) (comparing NRCP 60(b) to Fed. R. Civ. P. 60(b) and discussing the differences between the two rules). Thus, federal court opinions addressing whether the period of an appeal tolls the time for seeking relief from a final order or judgment, under Fed. R. Civ. P. 60(b), serve as persuasive authority for this court's examination of this issue with regard to NRCP 60(b).

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to this court. *Holiday Inn v. Barnett*, 103 Nev. 60, 732 P.2d 1376 (1987) (order denying NRCP 60(b) relief is appealable); NRAP 3A(b)(2) (order denying a motion for a new trial is appealable); *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983) (order denying a motion to modify a family court order, when the motion is based on changed factual or legal circumstances, is appealable as a special order after final judgment).

Our review of the federal courts' precedent reveals that the courts have overwhelmingly concluded that the one-year period for seeking relief under Fed. R. Civ. P. 60(b) is not tolled by the filing of a notice of appeal. *See The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1088 (10th Cir. 2005); *King v. First American Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002); *Berwick Grain v. Illinois Dept. of Agriculture*, 189 F.3d 556, 559 (7th Cir. 1999); *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, 766-77 (8th Cir. 1989); *Nevitt v. U.S.*, 886 F.2d 1187, 1188 (9th Cir. 1989); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987); *Carr v. District of Columbia*, 543 F.2d 917, 925-26 (D.C. Cir. 1976); *Transit Casualty Company v. Security Trust Company*, 441 F.2d 788, 791 (5th Cir. 1971); *see also* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.65[2][d] (3d ed. 2009) (stating that ''virtually all courts agree that a pending appeal does not toll'' the Rule 60(b) time limit). In implementing this rule, the Ninth Circuit Court of Appeals has noted that a contrary rule could impair the finality of judgments and prolong appellate proceedings that may take months or years to complete. *See Nevitt v. U.S.*, 886 F.2d 1187, 1188 (9th Cir. 1989) (noting concern in scholarly commentary over the impairment of finality of judgments and additions to the time necessary for appellate resolution). We find this approach to be sound practice and, thus, adopt the same approach with regard to requests for relief made under NRCP 60(b). Accordingly, we conclude that the six-month time period for seeking relief under NRCP 60(b)(2) is not tolled by the perfection of an appeal.[4]

Because appellants' pending appeal did not toll the six-month period for seeking NRCP 60(b)(2) relief, appellants' motion for NRCP 60(b)(2) relief was untimely filed in the district court. As a result, we deny their motion for remand, despite the district court's certification of its intent to grant the requested NRCP 60(b)(2) re-

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[4]Footnote 1 of our *Huneycutt* opinion states, without explanation or analysis, that ''[a]t this juncture, and in the posture of this proceeding, we are not concerned with the time constraints imposed by [NRCP 60(b) and 59(a)].'' 94 Nev. at 79 n.1, 575 P.2d at 585 n.1. Insomuch as this footnote implies that this court and the district court should not be concerned with whether the applicable time period for requesting relief under a statute or court rule has expired when determining whether to grant a motion for remand or certify intent to grant relief, we disapprove of the language in that footnote.

Additionally, because our caselaw demonstrates that a party may seek certification under statutes or court rules other than NRCP 60(b), *see Mack-Manley*, 122 Nev. 849, 138 P.3d 525 (motion to modify a child custody arrangement); *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005) (new trial motion), to the extent that any statute or court rule under which relief is sought limits how long a party has to seek relief under that statute or court rule, the perfection of a notice of appeal would likewise not toll the running of any such applicable time period.

lief. *See Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530 (indicating that, even if the district court certifies that it intends to grant relief, the decision as to whether a motion for remand will be granted remains within this court's discretion); *cf. Hancock Industries v. Schaeffer*, 811 F.2d 225, 239 (3d Cir. 1987) (rejecting a motion for remand made after the time for seeking relief under Fed. R. Civ. P. 60(b) had expired).

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.